HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

Matter No S514/2005

CAMPBELLS CASH AND CARRY PTY LIMITED APPELLANT

AND

FOSTIF PTY LIMITED RESPONDENT

Matter No S515/2005

AUSTRALIAN LIQUOR MARKETERS PTY LIMITED APPELLANT

AND

DALE LESLIE BERNEY RESPONDENT

Matter No S516/2005

IGA DISTRIBUTION (VIC) PTY LIMITED APPELLANT

AND

WHELAN & HAWKING PTY LIMITED RESPONDENT

Matter No S517/2005

QUEENSLAND INDEPENDENT WHOLESALERS PTY LTD
APPELLANT

AND

SYDNEY RICHARD VEITCH MURRAY & ANOR RESPONDENTS

Matter No S518/2005

IGA DISTRIBUTION (SA) PTY LIMITED APPELLANT

AND

PAUL ASHLEY NEINDORF & ANOR RESPONDENTS

Matter No S519/2005

COMPOSITE BUYERS PTY LIMITED APPELLANT

AND

BARRY GEORGE WILLIAMSON & ANOR RESPONDENTS

Matter No S520/2005

IGA DISTRIBUTION PTY LIMITED APPELLANT

AND

JOANNE MARGARET GOW & ORS RESPONDENTS

Campbells Cash and Carry Pty Limited v Fostif Pty Limited
Australian Liquor Marketers Pty Limited v Berney
IGA Distribution (Vic) Pty Limited v Whelan & Hawking Pty Limited
Queensland Independent Wholesalers Pty Ltd v Murray
IGA Distribution (SA) Pty Limited v Neindorf
Composite Buyers Pty Limited v Williamson
IGA Distribution Pty Limited v Gow
[2006] HCA 41
30 August 2006
S514/2005 to S520/2005

ORDER

In each matter:

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 31 March 2005 and in their place order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation

A J Myers QC with H K Insall SC and A E Ryan for the appellants (instructed by Freehills)

S J Gageler SC with M J Leeming for the respondents (instructed by Robert Richards & Associates)

Interveners

H C Burmester QC with R A Pepper for the Attorney-General of the Commonwealth intervening in all matters (instructed by Australian Government Solicitor)

B W Walker SC with M C Walker seeking leave to intervene on behalf of IMF (Australia) Limited (instructed by McMahons National Lawyers)

K P Hanscombe SC with L W L Armstrong and K W Dawson seeking leave to be heard as amicus curiae for the Australian Consumers Association (instructed by Public Interest Advocacy Centre)

CATCHWORDS

Campbells Cash and Carry Pty Limited v Fostif Pty Limited

Practice – Representative proceedings – Supreme Court Rules 1970 (NSW), Pt 8 r 13 – Representative proceedings brought in each case by a licensed tobacco retailer to recover from its wholesaler licence fees paid from the beginning of the financial year commencing 1 July 1997 until the decision in *Ha v State of New South Wales* which declared the licensing scheme invalid and which licence fees were not paid to the taxing authorities – Proceedings financed by litigation funder – Proceedings intended to be conducted by litigation funder on behalf of those retailers who "opted-in".

Practice – Representative proceedings – Supreme Court Rules 1970 (NSW), Pt 8 r 13 – Whether provisions for representative proceedings in the Supreme Court Rules were validly engaged – "Same interest" – Common interest of fact or law – Whether there were, at the time the proceedings were commenced, numerous persons who had the same interest in the proceedings – Proceedings intended to be conducted on behalf of those retailers who subsequently "opted-in" – None had "opted-in" when proceedings commenced – Relationship between "same interest" and relief sought.

Practice – Representative proceedings – Stay of proceedings – Abuse of process – Public policy – Proceedings financed by litigation funder – Litigation funder sought out possible claimants – Retailer gave up to funder one-third of its claim – Whether the representative proceedings should be stayed as contrary to public policy or an abuse of process – *Maintenance, Champerty and Barratry Abolition Act* 1993 (NSW).

Practice – Discovery – Right to administer interrogatories in representative proceedings to identify others with the "same interest" in the proceedings.

Constitutional law (Cth) – Judicial power of Commonwealth – Abuse of process – Consistency of common law doctrine of abuse of process with judicial process.

Words and phrases – "abuse of process", "maintenance and champerty", "public policy", "representative proceedings", "same interest", "trafficking in litigation", "overriding purpose rule".

Maintenance, Champerty and Barratry Abolition Act 1993 (NSW).
Supreme Court Rules 1970 (NSW), Pt 1, r 3; Pt 8, r 13.

1 GLEESON CJ. The issues in these appeals, and the relevant facts, are set out in the reasons of Gummow, Hayne and Crennan JJ. I agree with what is said in those reasons concerning the issues of public policy and abuse of process. The Court of Appeal's decision, favourable to the respondents, on those issues has not been shown to be in error. The proceedings do not constitute an abuse of process, and there was no reason in public policy why they should have been stayed.

2 On the issue whether the provisions of the Supreme Court Rules 1970 (NSW), Pt 8 r 13(1), were validly engaged I would uphold the decision of the Court of Appeal. The decision of this Court in *Carnie v Esanda Finance Corporation Ltd*[1] appears to me to require that conclusion.

3 In order to explain why that is so, it is necessary to refer to some details of the litigation in *Carnie*, which, in certain respects, was a more difficult case for the plaintiffs than the present. The main problem is that the rule of court in question in *Carnie*, and in the present case, was based on a model taken from the nineteenth century, and was ill-adapted to the exigencies of modern commercial litigation funding. The rule is required to bear a weight for which it was not designed.

4 In *Carnie*, the persons on whose behalf the plaintiffs brought their representative action all had separate contracts with Esanda. There was, however, more to the problem than that. The contracts in question were variations of contracts of loan between Esanda, a finance company, and borrowers who were unable to comply with their original obligations, and required some relief. By the variation agreements, they were given an extended time to pay their debts. The plaintiffs originally sought a declaration that their variation agreement, and the variation agreements of other borrowers with whom Esanda had dealt in the same manner, were "null and void and of no effect"[2]. The reason for this was a failure to comply with certain provisions of the *Credit Act* 1984 (NSW) ("the *Credit Act*"). The plaintiffs brought the proceedings on behalf of themselves and all other persons who entered into variation agreements which did not comply with the relevant provisions of the *Credit Act*. The variation agreements, however, to the extent to which they relieved their original position, were beneficial to the borrowers[3]. There was a real doubt whether it was in the interests of the people the plaintiffs were claiming to represent to have their variation agreements declared null and void. The plaintiffs sought to

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1 (1995) 182 CLR 398.

2 *Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382 at 386.

3 (1992) 29 NSWLR 382 at 385-386.

overcome this problem by modifying their claim to relief, but, as will appear, they were unable to make the problem disappear. It resulted from the nature of the contracts of variation. The three reports of the case, when it was before the Court of Appeal, then this Court, then Young J[4], all reveal the difficulty the plaintiffs had in formulating a claim for relief that did not have the capacity to disadvantage at least some of the people said to be represented.

5 This Court held that the provisions of Pt 8 r 13 were engaged. It also held, however, that there was a serious question whether the proceedings ought to continue as representative proceedings (a question of discretion as distinct from jurisdiction), and the matter was remitted to the Supreme Court of New South Wales. As Brennan J said[5], the application of the provisions of the *Credit Act* relied on "could prove to be a pyrrhic victory for a debtor".

6 When the matter went back to the Supreme Court of New South Wales, Young J recorded that a "very worrying aspect of [the] case [was] the possibility that [some borrowers] may, as a result of the plaintiffs' activity, which appears to have been taken without any reference to them, be left with a liability to Esanda"[6]. Young J imposed requirements as to explanatory circulars to be sent out in connection with an opt-in procedure that was devised in the absence of any provision in the rule to cover the situation. Subsequently, the plaintiffs announced that they were unwilling to incur the expense involved in meeting those requirements, and Young J, by consent, ordered that the action should not go ahead as a representative action.

7 A concern existed, and was recognized at all stages in *Carnie*, as to whether the proceedings were in the interests of all the other borrowers whom the plaintiffs claimed to represent. Yet this Court held that the rule was engaged and, in particular, that "the represented debtors" and the plaintiffs had the "same interest" in the action[7]. What was described by Mason CJ, Deane and Dawson JJ as "the requisite commonality of interest"[8] was held to follow from the common question of law (whether the variation agreements complied with the requirements of the *Credit Act*) that affected the rights and obligations that existed between Esanda and each individual borrower. This conclusion was

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4 *Carnie v Esanda Finance Corporation Ltd* (1996) 38 NSWLR 465.

5 (1995) 182 CLR 398 at 410.

6 *Carnie v Esanda Finance Corporation Ltd* (1996) 38 NSWLR 465 at 474.

7 The statement of claim said that the plaintiffs brought the proceedings on behalf of themselves and "the represented debtors" – see (1992) 29 NSWLR 382 at 385.

8 (1995) 182 CLR 398 at 405.

reached knowing that it was possible that some of the people whom the plaintiffs claimed to represent might be worse off if the action succeeded, and might not wish to be represented in the action. Hence the reservation of the discretionary issue, which turned out to be decisive. Yet, in *Carnie*, there was no other discretionary problem except such as arose from the potentially differing interests of some of "the represented debtors". If they all had the same interest in the broadest sense of that term, it is hard to see why there was any problem about allowing the proceedings to continue on a representative basis.

8 The inadequacy of the rule in making no prescription as to whether or not consent was required from borrowers who were represented, or as to procedures for opting in or opting out of the action, or as to notice to represented persons, or as to settlement or discontinuance of the proceedings, was treated by this Court as a matter affecting only the discretionary decision as to whether the proceedings should continue as discretionary proceedings, and not as affecting the initial engagement of the rule[9]. In the particular circumstances of that case, such inadequacy was a problem precisely because of the uncertainty about how some borrowers would be affected by the outcome of the action. From the point of view of the present plaintiffs, a notable feature of this Court's decision in *Carnie* is that the problem that was held to require the reservation and remitter of the discretionary issue was not regarded as standing in the way of a favourable decision on the jurisdictional issue. This Court held that the "same interest" existed, even though it appreciated that at least some of the borrowers, for good reason, might take a different view of where their basic interest lay. The decision to reserve and remit the discretionary issue highlights the decision on the jurisdictional issue.

9 On the question whether the rule is engaged, I am unable to distinguish *Carnie*. The statement of claim in *Carnie* asserted that the proceedings were brought by the plaintiffs on behalf of themselves and all other persons ("the represented debtors") who had entered into variation agreements which suffered from the same defects (in terms of compliance with the *Credit Act*) as did the plaintiffs' variation agreement. However, at the commencement of the action it was not known who those people were, or whether all (or any) of them would want to be represented in the action. The rule said nothing about obtaining their consent, or about procedures for opting in or opting out. This Court has left those difficulties to be worked out at the discretionary level of leave to proceed. In the present case the plaintiffs have sought to anticipate the problem. The summons contends that the proceedings are brought on behalf of themselves and all other persons ("the represented retailers") who paid the defendant supplier

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9 See, for example, (1995) 182 CLR 398 at 405 per Mason CJ, Deane and Dawson JJ.

during the relevant period the invalid excise (licence fee) and have not recovered the fee from the defendant. The summons in that respect appears to have been drafted to follow the form adopted in *Carnie*. The summons then anticipates an opt-in procedure, and says that the claim for relief will be made on behalf of the plaintiffs and members of the class earlier described who decide to opt in.

10 In the present case, there are common questions of law and fact affecting the rights and obligations between wholesalers and retailers resulting from the invalidity of the excise. Those identified by Mason P in the Court of Appeal[10] as common issues of law include not only the general matter of the scope of the principle established by *Roxborough v Rothmans of Pall Mall Australia Ltd*[11] but also the significance to the cause of action upheld in that case of certain specific legislation[12] and the relevance of the intention of individual retailers in evaluating their restitutionary claims. Common issues of fact included the invoicing practices of the defendants.

11 The relief sought in this case, unlike the relief sought in *Carnie*, does not appear to have the potential to harm the financial interests of any retailers. Of course, there may be other reasons why a retailer might prefer not to join in a lawsuit against a supplier. It is therefore, correct to say that participation in the proceedings, and any consequence for the rights of a retailer, is a matter of choice for the retailer. At the time of the commencement of the proceedings, it was not possible to identify any particular person who would opt in, and belong to the represented class. Yet in that respect, as it appears to me, the case is the same as *Carnie*.

12 Once it is accepted that the rule is engaged, and that the proceedings do not involve an abuse of process, then there is no independent ground for a conclusion that there should be an order, at least at this stage, that the matter should not proceed as a representative action. Mason P said:

> "One traditional function of representative proceedings is the avoidance of multiplicity of actions ... In my view there would have been a costly procedural morass if thousands of separate actions had been commenced by the various retailers ... The matters already addressed in these reasons demonstrate to my satisfaction that it is in the interests of justice to permit them to proceed along the lines of the opt-in basis proposed. Naturally, this will not preclude application for severance with

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10 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203.

11 (2001) 208 CLR 516.

12 *Business Franchise Licences (Tobacco) Act* 1987 (NSW) s 41(3).

respect to particular issues that may have to be tried touching the rights of individual retailers."

13 There is no error in that approach.

14 There was an argument about the orders for discovery sought against the appellants, but to the extent that it raised issues going beyond abuse of process the argument was within a fairly narrow compass. Einstein J, at first instance, had found against the respondents on issues of jurisdiction and abuse of process. Mason P said:

> "Einstein J declined to make the orders for discovery/ interrogatories because he had concluded that the representative proceedings had the fundamental flaws discussed above. His Honour nevertheless indicated that there was no objection in principle to such relief, even for the purpose of ascertaining the members of the class. He pointed out that discovery for the purpose of identifying parties is a remedy known to the law."

15 Mason P went on to conclude that, once the conclusion that the proceedings were fundamentally flawed was rejected, there was no sufficient discretionary reason to refuse discovery *in limine*. The discretionary decision of the Court of Appeal on this point discloses no error, and should stand.

16 These appeals were heard together with *Mobil Oil Australia Pty Limited v Trendlen Pty Limited*. In that case a constitutional argument was raised, and the appellants in these appeals adopted the argument and were given leave to amend their notices of appeal accordingly. It is convenient to deal with the point in these reasons.

17 The first two steps in the argument are uncontroversial. The first step is that the proceedings involve an exercise of federal jurisdiction. The underlying foundation of the claim made in the proceedings is that the amounts sought to be recovered were duties of excise rendered invalid by s 90 of the Constitution. The second step is that federal jurisdiction can be exercised only in respect of a matter.

18 The third, and controversial step, is that there is no matter in relation to which federal jurisdiction may be exercised. Rather, it is said, there is a litigation funder seeking, for its own profit, to manufacture controversies between as yet unidentified retailers and their suppliers. In this context, "matter" does not mean a legal proceeding. For there to be a matter there must be "some immediate right,

duty or liability to be established by the determination of the Court"[13]. It is not necessary that there be a conscious disagreement between individuals. Representative proceedings, even of the most traditional kind, commonly involve circumstances in which some, perhaps many, group members are not aware of the proceedings. This point was made in *Mobil Oil Australia Pty Limited v Victoria*[14]. Furthermore, as the Attorney-General of the Commonwealth, intervening, pointed out, it is not unusual for judicial power to be exercised in relation to controversies generated by one person on behalf of another, such as a case where a person under a disability makes a claim through a tutor, next friend or guardian.

19 Because a matter is distinct from legal proceedings, it is "identifiable independently of the proceedings which are brought for its determination"[15]. The rights and liabilities as between retailers and their suppliers in consequence of the imposition of charges on account of an excise later held to be constitutionally invalid are the subject of an actual dispute between some retailers and some suppliers, and of a potential dispute between others. Even if the intervention of a litigation funder, seeking to promote an assertion by more retailers of their rights, be regarded as some form of intermeddling, there is no justification for denying the existence of a matter.

20 An alternative submission, also based on the assumption that what is involved is an exercise of federal jurisdiction, is that the common law doctrine of abuse of process is an inadequate rubric under which to consider the objections that can be taken to this kind of litigation, and that the proceedings offend normative implications to be derived from the structure of Ch III of the Constitution.

21 In *Chu Kheng Lim v Minister for Immigration*[16], Brennan, Deane and Dawson JJ identified as a limitation on the exercise of judicial power the requirement of consistency "with the essential character of a court or with the nature of judicial power". For the reasons given by Gummow, Hayne and Crennan JJ in their discussion of the abuse of process argument, with which I agree, there is no inconsistency with the essential character of a court or with the nature of judicial power involved in the exercise of federal jurisdiction invoked in the present case.

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13 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.

14 (2002) 211 CLR 1 at 27 [22].

15 *Fencott v Muller* (1983) 152 CLR 570 at 603.

16 (1992) 176 CLR 1 at 27.

22 The appeals should be dismissed with costs.

23 GUMMOW, HAYNE AND CRENNAN JJ. In 1997, each of the appellants carried on business selling tobacco products by wholesale to supermarkets and other retailers. Together, the appellants had about 21,000 customers. As wholesalers of tobacco products the appellants paid licence fees pursuant to the *Business Franchise Licences (Tobacco) Act* 1987 (NSW) and equivalent legislation of other States and the Australian Capital Territory. Those licence fees were payable monthly and were calculated as a nominal sum plus a prescribed percentage of the value of tobacco sold in a period preceding the licence period.

24 On 5 August 1997 this Court held, in *Ha v New South Wales*[17], that the licence fees were duties of excise within s 90 of the Constitution, and hence were invalid. Subsequently, in *Roxborough v Rothmans of Pall Mall Australia Ltd*[18], this Court held that retailers, who had bought tobacco products from a licensed wholesaler on terms that the "invoiced cost" comprised the wholesale price of the products and a further amount representing the licence fee, could recover from the wholesaler, as money had and received, the amount paid for the licence fee and which the wholesaler had not remitted to the taxing authority by the date of the decision in *Ha*. The Court further held, in *Roxborough*, that the action for money had and received is not defeated simply because the plaintiff had recouped the outgoing from others (as the appellants in *Roxborough* had when they sold the goods to customers at a price which covered the amount they sought to recover from the wholesaler).

25 Mr Adrian Firmstone is the sole director of Firmstones Pty Ltd ("Firmstones"), a company which trades as "Firmstone & Feil, Consultants". Mr Firmstone said Firmstones provided "advice and assistance in relation to indirect tax matters, including with respect to the recovery for tobacco retailers of amounts referable to state tobacco licence fees paid by tobacco retailers to tobacco wholesalers". During 2002, Firmstones sought to encourage tobacco retailers to claim from wholesalers a refund of tobacco licence fees which the retailers had paid but the wholesalers had not remitted to the relevant taxing authority.

26 From March 2002, Firmstones wrote to tobacco retailers asking for authority to act on the retailers' behalf in recovering these amounts. The letters took various forms but all said that Firmstones' "success fee" was $33^1/_3$ per cent of any money received by the retailer from the tobacco wholesaler. If costs were

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17 (1997) 189 CLR 465.

18 (2001) 208 CLR 516.

awarded to the retailer, Firmstones would retain the sum awarded; if costs were awarded against the retailer, Firmstones would bear those costs. Reference was made in the letters to another company (GST Partners Pty Ltd or, later, Horwath GST Pty Ltd) being responsible for "the administration of this project", but it is not necessary to examine what that other company did, or how the fees received by Firmstones were to be divided between Firmstones and the other company.

27 In about the middle of September 2002, Firmstones retained a solicitor, Robert Richards & Associates, to act in what Mr Firmstone described to the sole principal of that firm, Mr Richards, as "[o]ur tobacco licence fee recovery project". Mr Richards was to be "the project's solicitor".

28 During 2002 and the first half of 2003, a number of claims were made and settled, but Firmstones believed that there were many retailers who had not considered making a claim. Firmstones formed the view that the limitation period for retailers to make claims against wholesalers expired at the end of June 2003[19].

The proceedings

29 On 30 June 2003, Firmstones caused Mr Richards to issue a number of summonses in the Commercial List of the Equity Division of the Supreme Court of New South Wales. Among them were summonses instituting the seven proceedings which give rise to the present appeals. It is not necessary to consider the other proceedings. For all practical purposes, the summonses issued in the seven matters which give rise to the present appeals were identical. It is convenient to take the proceedings between Fostif Pty Limited ("Fostif") as plaintiff, and Campbells Cash and Carry Pty Limited ("Campbells") as defendant, as typical of the others. The steps which have been taken in those proceedings have been taken in the others.

30 The Fostif proceedings were commenced as representative proceedings pursuant to Pt 8 r 13 of the Supreme Court Rules 1970 (NSW) ("the 1970 Rules")[20]. The plaintiff's contentions, recorded in the summons, alleged that the plaintiff "brings these proceedings on behalf of themselves and all other persons (the 'represented retailers')" who:

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19 *Limitation Act* 1969 (NSW), s 14(1)(a).

20 Representation of concurrent interests is now dealt with in Div 2 of Pt 7 of the Uniform Civil Procedure Rules 2005 (NSW).

"(a) during the whole or some part of the Relevant Period:

(i) were retailers of tobacco products carrying on business in one or more of New South Wales, Queensland, Victoria, South Australia, Australian Capital Territory and Tasmania;

(ii) purchased tobacco products sold to them by the defendant;

(iii) paid to the defendant the amount of the licence fee referable to the sales in (ii) as separately identifiable and severable parts of the consideration payable in respect of each sale;

(b) have not recovered from the defendant an amount or amounts referable to the licence fees paid to the defendant as referred to in (a)(iii) or otherwise released or agreed to release the defendant from any liability or alleged liability to make payment to them of the amount in (a)(iii)."

31 No person was named in the summons as a "represented retailer". Rather, the summons provided for what it described as "opt-in" procedures by which persons might later consent to becoming a plaintiff. This procedure was described in the summons in the following terms:

"1. The plaintiff claims the relief set out in this Summons on behalf of themselves and the class of unnamed persons referred to in paragraph 2 of the plaintiff's contentions below whom the plaintiff represents in the proceedings pursuant to the Supreme Court Rules 1970, Part 8, rule 13. By reason of the 'opt-in' procedures referred to below, at the time of judgment there will be no unnamed person in respect of whom judgment is sought. Once a member of the class of represented retailers has signed and returned an 'opt-in' notice to the plaintiff's solicitor that person will become a named plaintiff in the proceedings entitled to judgment in his, her or its favour.

2. The plaintiff proposes to give the unnamed members of the class whom the plaintiff represents an opportunity to decide whether they wish to be involved in the proceedings by the sending of an 'opt-in' notice to these persons. The members of the class will be required to sign and return the 'opt-in' notice to the solicitors for the plaintiff in order for these persons to become involved as plaintiff in the proceedings. Receipt by the plaintiff's solicitor of a signed 'opt-in' notice will establish that the represented retailer has consented to becoming a plaintiff."

Because the plaintiff and its solicitors were said to know the names and addresses of "some but not all [of] the unnamed members of the class whom the plaintiff represents" it was said that "it will be necessary for the defendant, who possesses this information, to discover it in the proceedings". The plaintiff said, in its summons, that it would "seek orders for such discovery from the Court at the earliest opportunity".

The applications at first instance

32 As foreshadowed in the summons, the plaintiff applied for orders that the defendant give discovery of documents and discovery by answering interrogatories revealing the names and addresses of "represented retailers" with whom the defendant had dealt between 1 July 1997 and 5 August 1997. The plaintiff further sought directions that, within 28 days of the defendant giving discovery, the plaintiff should send to each represented retailer an opt-in notice and accompanying letter. Both the draft notice, and the letter which it was proposed should be sent with it, recorded that Firmstones would receive $33^1/_3$ per cent of any amounts recovered, together with any amount awarded to the plaintiff as costs. The draft opt-in notice gave Firmstones authority to act on behalf of the retailer concerned in relation (among other things) to the conduct of, and the giving of instructions in, the proceedings, and "entering into settlement agreement(s) with the defendant(s) (provided the amount is not less than 75% of the principal amount claimed from the defendant(s))".

33 In response to these applications by the plaintiff, the defendant gave notice of motion for orders that the proceedings be dismissed or stayed as an abuse of process, or that the proceedings be struck out in so far as they purported to be representative proceedings, or alternatively not continue as representative proceedings.

34 On 11 September 2003, Einstein J published[21] reasons for decision concluding that there was "insufficient commonality of interest demonstrated presently to permit of a finding that it is appropriate for the proceedings to be permitted to go forward as representative proceedings". That conclusion was expressed as founding an order, pursuant to Pt 8 r 13(1), that the proceedings not continue as representative proceedings rather than as a conclusion about whether the rule had been validly engaged at the time the proceedings were commenced. Several distinct reasons were given for the conclusion that the Court should order

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21 *Keelhall Pty Ltd t/as "Foodtown Dalmeny" v IGA Distribution Pty Ltd* (2003) 54 ATR 75.

that the proceedings not continue as representative proceedings. In particular, Einstein J concluded that: (a) the "litigation funding arrangements proposed by the opt-in procedure are against public policy as well as comprising an abuse of the court process"; (b) the persons whom the plaintiff proposed to represent "cannot be said to have the 'same interest' in the proceedings"; and (c) contrary to the so-called "overriding purpose rule"[22], to permit the proceedings to go forward as representative proceedings, "far from facilitating the just, quick and cheap resolution of the real issues, would give rise to a procedural morass likely ultimately to be able to be resolved only by a disaggregation of the representative proceedings into separate proceedings". The parties were given leave to address further submissions about the orders that should be made.

35 Evidence tendered on the hearing of the applications with which the reasons for decision dealt had revealed that Firmstones had, by that time, already been retained by about 2,100 persons or entities who, so it was asserted, fell within the class of represented retailers described in the summonses that had been issued. After the reasons for decision were published, the plaintiff applied for orders that those who had already been retained by Firmstones should be given leave to elect to be joined as plaintiffs in the proceedings by filing a written consent to joinder.

36 On 7 November 2003, having considered the further application made by the plaintiff, Einstein J made orders[23] in the Fostif proceedings (and in the other proceedings) that they not continue as representative proceedings, that the plaintiff's applications for discovery and directions for the giving of opt-in notices be dismissed, and that the application to permit the joinder of additional plaintiffs also be dismissed.

37 Fostif (and the plaintiffs in each of the six other proceedings which give rise to the present appeals) appealed to the Court of Appeal (by leave of that Court) against the orders made by Einstein J. The Court of Appeal (Mason P,

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22 Supreme Court Rules 1970 (NSW), Pt 1 r 3, sub-rr (1) and (2) of which provided:

> "(1) The overriding purpose of these rules, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in such proceedings.
>
> (2) The Court must seek to give effect to the overriding purpose when it exercises any power given to it by the rules or when interpreting any rule."

23 *Ekaton Corporation Pty Ltd v Shahin Enterprises Pty Ltd* [2003] NSWSC 1018.

Sheller and Hodgson JJA) allowed[24] the appeals, set aside the orders of Einstein J and ordered that the proceedings continue as representative proceedings.

38 By special leave, the respondents in the Court of Appeal appeal to this Court.

The issues in this Court

39 The issues that arise in the appeal to this Court can be identified as being:

(a) whether the provisions for representative proceedings made by the 1970 Rules were validly engaged;

(b) if those Rules were validly engaged, whether the proceedings nonetheless should have been stayed as being contrary to public policy or as an abuse of process; and

(c) if those Rules were validly engaged, and if the proceedings were not to be stayed, was Einstein J right to order that the proceedings not continue as representative proceedings?

The parties' arguments in this Court were principally directed to the questions about public policy and abuse of process said to arise from the arrangements Firmstones had made, and proposed to make, with "represented retailers". It is convenient to deal first, however, with the issue about the representative character of the proceedings (again by reference to the Fostif proceedings) and to begin by examining the relevant rules of court.

40 In the submissions, the parties tended to speak of "class actions" as if there were a single, distinct kind of proceedings available by that name. However, the rules governing representative or group proceedings vary greatly from court to court. Two things of present significance follow from this. The first is that close attention must be given to the particular Rules of the Supreme Court upon which this litigation turns. The second is that the outcome of the present proceedings with respect to those Rules is not to be taken necessarily as indicating that there would have been the same outcome in proceedings under the rules of other courts.

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24 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203.

The 1970 Rules, Pt 8 r 13

41 At the time the proceedings were instituted, Pt 8 r 13 of the 1970 Rules provided:

"**Representation: concurrent interests**

13 (1) Where numerous persons have the same interest in any proceedings the proceedings may be commenced, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) At any stage of proceedings pursuant to this rule the Court, on the application of the plaintiff, may appoint any one or more of the defendants or other persons (as representing whom the defendants are sued) to represent all, or all except one or more, of those persons in the proceedings.

(3) Where, under subrule (2), the Court appoints a person who is not a defendant, the Court shall make an order under rule 8 adding him as a defendant.

(4) A judgment entered or order made in proceedings pursuant to this rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.

(5) An application for leave under subrule (4) shall be made by motion, notice of which shall be served personally on the person against whom it is sought to enforce the judgment or order.

(6) Notwithstanding that a judgment or order to which an application under subrule (5) relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from the liability.

(7) This rule does not apply to proceedings concerning:

(a) the administration of the estate of a deceased person; or

(b) property subject to a trust."

Representative proceedings

42 The form of Pt 8 r 13 of the 1970 Rules can be traced through O 16 r 9 of the English Rules of the Supreme Court 1883, via r 10 of the Rules of Procedure set out in the schedule to the *Supreme Court of Judicature Act* 1873 (UK), to the former Chancery practice[25]. The former Chancery practice with respect to representative proceedings was considered by this Court in *Wong v Silkfield Pty Ltd*[26].

43 The former Chancery practice was governed by two principles. The first was that all persons materially interested in the subject-matter of the suit ought generally to be made parties so as to settle the controversy by binding to the final decree those interested. The second principle was that, in observing the first, care was required to avoid embracing in the proceedings parties with an insufficient interest and thereby risking a demurrer on the ground of multifariousness.

44 These questions of parties were determined "upon considerations of convenience with regard to the circumstances of each particular case"[27].

45 In 1901, Lord Macnaghten said[28] that "[t]he old rule in the Court of Chancery was very simple and perfectly well understood ... Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent." Part 8 r 13 of the 1970 Rules, like other rules derived from O 16 of the 1883 English Rules, referred to "numerous persons [having] the same interest in any proceedings". It is not to be supposed that referring to "the same interest" was intended to give the rule a narrower operation than the former Chancery practice when that practice was described by reference to "common interest". Rules like Pt 8 r 13, and the former Chancery practice, were intended to facilitate

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25 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 29-30 [33]-[34].

26 (1999) 199 CLR 255 at 261-263 [13]-[17] per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ.

27 *Coates v Legard* (1874) LR 19 Eq Cas 56 at 59 per Sir George Jessel MR. See also *Templeton v Leviathan Proprietary Ltd* (1921) 30 CLR 34 at 76 per Starke J; *Cockburn v Thompson* (1809) 16 Ves Jun 321 at 325-326 [33 ER 1005 at 1007]; *Willats v Busby* (1842) 5 Beav 193 [49 ER 551].

28 *Duke of Bedford v Ellis* [1901] AC 1 at 8.

the administration of justice[29] and neither the Rules nor the former practice was to be restricted "to cases for which an exact precedent can be found in the reports"[30]. The principle on which rules of this kind were based was said[31], in 1901, to be "as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires".

46 Even so, in 1910, the English Court of Appeal held[32] that the rule could not be engaged where plaintiffs sued for damages for breach of separate and individual contracts. But such a narrow approach to Pt 8 r 13 of the 1970 Rules was rejected by this Court in *Carnie v Esanda Finance Corporation Ltd*[33]. The Court held in *Carnie* that persons having separate causes of action in contract or tort may have "the same interest" in proceedings for the purposes of Pt 8 r 13(1). The fact that the claims arose under separate contracts was held not sufficient of itself to defeat the rule's requirement that numerous persons have the same interest in the proceedings.

47 It is to be noted that Pt 8 r 13 of the 1970 Rules contained few provisions equivalent to those found in the more elaborate regulation of representative proceedings provided by Pt IVA (ss 33A-33ZJ) of the *Federal Court of Australia Act* 1976 (Cth). In particular, there are no provisions of the 1970 Rules that are immediately equivalent to the provisions of s 33C(1)(a) (requiring that seven or more persons have claims against the same person for the procedures of Pt IVA to be engaged), s 33J (providing for group members to opt out of representative proceedings), s 33T (empowering the Court to substitute another group member for a representative party not able adequately to represent the interests of the group) or s 33V (in so far as it requires the approval of the Court for settlement or discontinuance of the proceedings).

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29 *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398 at 404 per Mason CJ, Deane and Dawson JJ.

30 *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] AC 426 at 443 per Lord Lindley.

31 *Taff Vale* [1901] AC 426 at 443 per Lord Lindley.

32 *Markt & Co Limited v Knight Steamship Company Limited* [1910] 2 KB 1021.

33 (1995) 182 CLR 398.

48 The absence of more elaborate provisions of the kind made by Pt IVA was held, in *Carnie*, to be no reason to give Pt 8 r 13 of the 1970 Rules a narrow construction or a narrow operation. As Mason CJ, Deane and Dawson JJ said[34]:

> "Much as one might prefer to have a detailed legislative prescription by statute or rule of court regulating the incidents of representative action, r 13 makes provision for an action to proceed as a representative action in a context in which there is no such legislative prescription. The absence of such a prescription does not enable a court to refuse to give effect to the provisions of the rule. Nor, more importantly, does the absence of such prescription provide a sufficient reason for narrowing the scope of the operation of the rule, as the Court of Appeal did[35], without giving effect to the purpose of the rule in facilitating the administration of justice."

Nevertheless, accepting these general propositions, the question which the present rule presents is, as Toohey and Gaudron JJ pointed out in *Carnie*[36]:

> "Do numerous persons have the same interest in the action which the [plaintiff has] commenced? If they do not then that is the end of the matter. If they do, then the action is properly begun and, unless the Court otherwise orders, it may be continued."

Numerous persons having the same interest?

49 In this Court and in the courts below, those who are appellants in this Court (the defendants to the original proceedings) submitted that there were not numerous persons who had the same interest in the proceedings which had been commenced. This submission was put in a number of ways. The appellants emphasised what they submitted was the circular nature of the definition of represented retailers, in effect, as those entitled to judgment against the appellants. This manner of identifying those who were, or were to be, represented was said to reveal that there was no substantial issue of fact or law between the persons thus identified and the appellants that was common to the represented parties. The appellants submitted that the law being settled in *Roxborough*, all that would be in issue was an examination of the separate contracts which each retailer had made with the appellant concerned.

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34 (1995) 182 CLR 398 at 404.

35 *Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382.

36 (1995) 182 CLR 398 at 421.

50 As noted earlier, the bare fact that the claims made by those who are represented by the named plaintiff in a representative action arise out of separate contracts does not necessarily deny the existence of a common interest between the represented parties and the defendant. In this case, a common issue of fact and law could be found to exist in deciding which particular transactions undertaken by the parties fell within the principles decided in *Roxborough*. The appellants' submissions assumed that that inquiry would be very simple. That may or may not be so, but even if it is, the fact that an issue may be simply resolved does not deny its existence, and does not demonstrate that it is not an issue common to a number of claims arising out of separate contracts.

51 In the course of oral argument, however, a more deep-seated question emerged concerning the application of Pt 8 r 13(1) to the present proceedings. The authority given by Pt 8 r 13(1) to commence representative proceedings depended upon there being, at the time the proceedings were commenced, "numerous persons [having] the same interest" in the proceedings. So much follows from the opening clause of the rule: "[w]here numerous persons have the same interest in any proceedings the proceedings may be commenced". The procedure contemplated in these proceedings was that those who wished to take the benefit of the proceedings must "opt-in". None had done so when the proceedings commenced. Were there, at the time these proceedings were commenced, numerous persons who had the same interest in the proceedings?

52 The summons by which the proceedings were commenced first identified the persons on whose behalf the plaintiff brought the proceedings as "themselves and all other persons" who fell within the description given in the summons of "represented retailers". That description, the text of which is set out earlier in these reasons, identified "represented retailers", in effect, as any person who could make a claim against the defendant like the claim made in *Roxborough* and who had not released the claim or been paid. But the summons went on to describe an "opt-in" procedure which, if followed, would bring about the result that "at the time of judgment there will be no unnamed person in respect of whom judgment is sought". Read as a whole, it is apparent that the summons sought to institute proceedings the result of which would bind only those from within the class of represented retailers who actively chose to be bound.

53 That some (even all) of those whom it is alleged have the same interest as the named plaintiff know nothing of proceedings that are instituted on their behalf would not, standing alone, deny that numerous persons have the same

interest in the proceedings[37]. Such ignorance (if it persisted) might later be said to be relevant to whether the action should be continued as representative proceedings, but that is beside the present point which looks to the institution of the proceedings, not their continuation.

54 Accepting then that the rule did not require the separate identification of, and consent from, those who were said to constitute the "numerous persons", was there, nonetheless, a class of persons sufficiently identified that together could be seen to be "numerous persons [having] the same interest" in the proceedings? That question is not to be asked or answered in the abstract. It is a question that must be asked and answered with respect to the particular proceedings.

55 In the present cases, that requires consideration of the whole of the summons issued in each matter. Not least is that necessary because questions about the engagement of Pt 8 r 13 must be considered having regard to the purposes of the rule. A central objective of the representative procedures for which Pt 8 r 13 provided was the avoidance of multiplicity of proceedings and the efficient determination, once and for all, of controversies in which parties have the same interest. An important indication of the nature of the interest that numerous persons must have in proceedings instituted under Pt 8 r 13 was given by Pt 8 r 13(4). A judgment entered or order made in the proceedings "shall be binding on all the persons as representing whom the plaintiffs sue". What the rules were intended to achieve was a single judicial determination of common issues in a way that binds those who were interested in those issues. Whether the present matters fell within Pt 8 r 13(1) must be considered having regard to what the summons said about parties, what issues were raised in the proceedings, and what relief was sought in the proceedings.

56 The summons issued in the Fostif matter contained a prayer for relief claiming "[j]udgment against the defendant in favour of the plaintiff together with interest pursuant to section 94 of the Supreme Court Act (NSW)", "further or other orders", and costs. The nature or form of judgment sought was not further specified in the prayer for relief but it was apparent, from other parts of the summons (particularly the statement of the nature of the dispute and the statement of the plaintiff's contentions), that Fostif claimed judgment for a money sum, and that any who later chose to opt-in to the proceedings would make like claims. The amount of Fostif's claim was set out in a schedule to the summons. But when instituted, the proceedings made no other claim.

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37 *Wilson v Church* (1878) 9 Ch D 552; *Fraser v Cooper, Hall & Co* (1882) 21 Ch D 718.

57 At the time the summons was issued there were persons, other than Fostif, whom it could be said would be "affected" by a decision of the claim made by Fostif against Campbells. The most obvious persons "affected" were any other persons who had bought tobacco products from Campbells by transactions relevantly identical to the transactions identified as having been made between Fostif and Campbells. But when the proceedings were instituted, Fostif made no claim on behalf of any of those other purchasers. Their participation in the proceedings, and any consequence for their rights, depended upon them choosing to join the proceedings. Deciding Fostif's claim would decide no issue between any of those other purchasers and Campbells unless or until those others chose to participate in the proceedings. The only effect that the decision of Fostif's claim would have would be its precedential value.

58 At the time the summons was issued to commence the Fostif proceedings, there were no persons, other than Fostif, who had an interest in the proceedings which were instituted, as distinct from an interest in knowing which way the issues raised in those proceedings were decided. No other person had an interest in those proceedings because no order made or judgment given in the proceedings would bind that other person. No grant of declaratory relief was sought to resolve or determine any question[38] common to the "numerous persons" alleged to have "the same interest in the proceedings". The summons is thus to be distinguished from the statement of claim in *Carnie*, where the plaintiffs claimed declarations for the common benefit of "the represented debtors"[39]. No doubt it was hoped that the procedures for "opting-in", which the summonses contemplated would be followed *after* the proceedings had been instituted, would lead to there being numerous persons with the same interest, but that was a hope or expectation about future events.

59 It may readily be accepted that, when the proceedings in *Carnie* were issued, it may have been difficult to list all of the persons whom the plaintiffs represented. And some who met the relevant criteria may later have sought exclusion from representation. In that sense, one could not say at the time the proceedings in *Carnie* were issued who the plaintiffs represented. But it was clear that there were numerous persons who were represented. By contrast, in the *Fostif* proceedings, where it was sought to represent only those from within the class of represented retailers who actively chose to be bound, it could not be said that there was *any* person, let alone numerous persons, whom the plaintiff would represent.

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38 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 267 [27].

39 *Esanda Finance Corp v Carnie* (1992) 29 NSWLR 382 at 386.

60 The requirements of Pt 8 r 13(1) of the 1970 Rules were not met in the present matters. Neither when the proceedings were instituted, nor when Einstein J made his orders, were there numerous persons having the same interest in the proceedings that were commenced. The only persons who then had an interest in the proceedings were the named plaintiffs. That would be reason enough to conclude that the Court of Appeal erred in ordering that the proceedings should continue as representative proceedings. It is as well, however, to go on to consider the larger questions of public policy and abuse of process which were agitated.

Public policy and abuse of process in the courts below

61 As noted earlier, Einstein J held that the litigation funding arrangements, that had already been made and were proposed to be made by Firmstones, were "against public policy as well as comprising an abuse of the court process". It may be doubted, however, that any clear distinction was drawn at first instance between the principles that were to be applied under those two headings. At the least they were understood as being closely interconnected.

62 Campbells (and the defendants in the other proceedings) had relied in their notice of motion upon Pt 13 r 5 and Pt 15 r 26 of the 1970 Rules for their application that the proceedings be dismissed as an abuse of the process of the Court. The relationship between the 1970 Rules and the inherent power of the Supreme Court with respect to abuse of its process was considered in *Batistatos v Roads and Traffic Authority (NSW)* by Gleeson CJ, Gummow, Hayne and Crennan JJ[40]. No point respecting that relationship was taken by the parties in the present appeals. It appears also to have been assumed that what was engaged here by the reliance upon public policy was that category of abuse concerned with invocation of the procedures of the Court for an illegitimate purpose[41].

63 The Court of Appeal concluded that neither the role occupied by Firmstones in connection with the litigation, nor the particular funding arrangements that were made and proposed to be made, justified the staying of the proceedings. The Court concluded that whether proceedings funded by a litigation funder are an abuse of process depends on whether the role of that funder "has corrupted or is likely to corrupt the processes of the court to a degree

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40 (2006) 80 ALJR 1100 at 1108-1110 [19]-[26]; 227 ALR 425 at 431-433.

41 *Batistatos v Roads and Traffic Authority (NSW)* (2006) ALJR 1100 at 1108 [15]; 227 ALR 425 at 430.

that attracts the extraordinary jurisdiction to dismiss or stay permanently for abuse of process"[42]. In the present matters, the Court of Appeal identified several facts as requiring the conclusion that there was no abuse of process. First, the proceedings were under judicial supervision[43]; second, Firmstones' control of the litigation was "not excessive"[44]; third, Firmstones' fees were not excessive[45]; fourth, there was a solicitor on the record[46]; and fifth, the individual claims were small (making separate recovery processes unlikely[47]).

64 At first instance, Einstein J had characterised[48] Firmstones' activities as "trafficking in the retailers' litigation", and made[49] a number of more specific criticisms of the relationships that existed between Firmstones, the retailers and the solicitor engaged by Firmstones to act in "the project". Particular emphasis was given to statements made in correspondence between Firmstones and the solicitor to the effect that the solicitor was engaged by Firmstones as principal, not as agent for the retailers, and that Firmstones would "liaise with [its] clients, [the solicitor] will not directly liaise with [Firmstones'] clients".

65 In the Court of Appeal, Mason P, who gave the principal reasons of the Court, rejected[50] the criticisms made of the relationship between the solicitor and the retailers, concluding that the solicitor had adopted the normal role as a solicitor on the record in the litigation. Questions of public policy were treated[51] as having turned at first instance on whether the funding arrangements were

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42 (2005) 63 NSWLR 203 at 234 [132].

43 (2005) 63 NSWLR 203 at 235 [136].

44 (2005) 63 NSWLR 203 at 235 [137].

45 (2005) 63 NSWLR 203 at 236 [144].

46 (2005) 63 NSWLR 203 at 235 [136].

47 (2005) 63 NSWLR 203 at 237 [149].

48 *Keelhall Pty Ltd t/as "Foodtown Dalmeny" v IGA Distribution Pty Ltd* (2003) 54 ATR 75 at 100 [60].

49 (2003) 54 ATR 75 at 101 [64].

50 (2005) 63 NSWLR 203 at 223-224 [86].

51 (2005) 63 NSWLR 203 at 227 [105].

champertous. Mason P said[52] that the policy of the law had changed: "[t]he law now looks favourably on funding arrangements that offer access to justice so long as any tendency to abuse of process is controlled". Mason P concluded[53] that the present litigation should be regarded as falling within the principle that "[p]ublic policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation"[54].

The *Maintenance, Champerty and Barratry Abolition Act* 1993 (NSW)

66 Examination of questions of public policy must begin from consideration of the *Maintenance, Champerty and Barratry Abolition Act* 1993 (NSW) ("the Abolition Act"). By the Abolition Act the offence of maintenance, including champerty that, but for s 3 of the Act, would be punishable by the common law, was abolished. Section 4 of the Abolition Act provided that "[a]n action in tort no longer lies on account of conduct known as maintenance (including champerty)". Sections 3 and 4 indicated that the principles respecting maintenance and champerty were expressed both in the criminal law and the law of tort. But s 6 of the Abolition Act assumed that when the statute was enacted there may have been a more broadly based rule in the Australian common law. Section 6 provided that:

> "This Act does not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal, whether the contract was made before, or is made after, the commencement of this Act."

67 It is evident from s 6 of the Abolition Act that questions of maintenance and champerty are not to be regarded as always legally irrelevant. Section 6 assumes that considerations of public policy and illegality can still arise in connection with contracts providing for or dealing with maintenance or champerty. The Abolition Act, however, does not state explicitly whether questions of maintenance or champerty are relevant to issues of abuse of process. Nor does it deal directly with what scope is to be given to public policy or doctrines of illegality when the conduct in question is no longer to be characterised as criminal or tortious. To consider what scope might be given to

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52 (2005) 63 NSWLR 203 at 227 [105].

53 (2005) 63 NSWLR 203 at 227 [105].

54 *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA Civ 292 at [54] per Lord Phillips MR.

public policy and illegality in this context, it is necessary to look more closely at some aspects of the development of the law of maintenance and champerty.

Some aspects of the development of the law of maintenance and champerty

68 The law of maintenance and champerty has been traced to the Statute of Westminster the First (3 Edw I c 25) of 1275[55]. Some[56] trace it back to Greek law and Roman law. Be this as it may, Coke identified maintenance as an offence at common law[57] and champerty was a particular species of maintenance[58]. Although traditionally identified as a common law offence, several early statutes are understood as affirming or declaring that common law[59].

69 By the 19th century, the law of maintenance was understood by Lord Abinger CB[60] as:

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55 Dennis, "The Law of Maintenance and Champerty", (1890) 6 *Law Quarterly Review* 169 at 171. But see Winfield, "The History of Maintenance and Champerty", (1919) 35 *Law Quarterly Review* 50; Co Litt 368 b.

56 *Elliott Associates LP v Banco de La Nacion* 194 F 3d 363 at 372 (1999); Cohen and Schwartz, "Champerty and Claims Trading", (2003) 11 *American Bankruptcy Institute Law Review* 197 at 197.

57 2 *Coke's Institutes* 208.

58 Stephen defined the two terms in *A Digest of the Criminal Law (Crimes and Punishments)*, (1877) at 86 as:

> "Maintenance is the act of assisting the plaintiff in any legal proceeding in which the person giving the assistance has no valuable interest, or in which he acts from any improper motive.
>
> Champerty is maintenance in which the motive of the maintainor is an agreement that if the proceeding in which the maintenance takes place succeeds, the subject matter of the suit shall be divided between the plaintiff and the maintainor."

59 The statutes, ranging from 3 Edw I c 25 to 32 Hen VIII c 9 are collected in Lord Phillimore's speech in *Neville v London "Express" Newspaper Ltd* [1919] AC 368 at 426.

60 *Findon v Parker* (1843) 11 M & W 675 at 682-683 [152 ER 976 at 979].

> "confined to cases where a man *improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions,* or to make defences *which they have no right to make* ... [By contrast], if a man were to see a poor person in the street oppressed and abused, and without the means of obtaining redress, and furnished him with money or employed an attorney to obtain redress for his wrongs, it would require a very strong argument to convince me that that man could be said to be stirring up litigation and strife, and to be guilty of the crime of maintenance." (emphasis added)

Yet in *Bradlaugh v Newdegate*[61], Lord Coleridge CJ held that an action for maintenance at common law existed, but made no reference, in an extensive review of the authorities[62], to any requirement that the claim maintained be an *unjust* claim. Rather, the exceptions recognised to the general prohibition on maintaining the claim of another were seen as turning on whether the maintainer acted from charitable motives or because the person maintained was near kin, a servant, or in some like relationship to the maintainer[63].

70 Champerty included every kind of maintenance for reward, whether by sharing of the "thing in plea" or otherwise[64]. This understanding of champerty was originally seen as precluding the assignment of choses in action. The reason given in Coke's report of *Lampet's Case*[65] was:

> "the great wisdom and policy of the sages and founders of our law, who have provided, that no possibility, right, title, nor thing in action, shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and chiefly of terre-tenants, and the subversion of the due and equal execution of justice."

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61 (1883) 11 QBD 1.

62 (1883) 11 QBD 1 at 7-9.

63 (1883) 11 QBD 1 at 11; *Harris v Brisco* (1886) 17 QBD 504 at 513-514.

64 Dennis, "The Law of Maintenance and Champerty", (1890) 6 *Law Quarterly Review* 169 at 179.

65 (1613) 10 Co Rep 46b at 48a [77 ER 994 at 997]. See also Co Litt 232b n.1.

71 As Winfield pointed out[66], Coke's theory was "perilously close to an anachronism". In *Norman v Federal Commissioner of Taxation*[67], Windeyer J said of *Lampet's Case* that "[i]t was a somewhat unsophisticated view of legal rights that led the common lawyers to classify choses in action and debts with mere possibilities, and to condemn all assignments of them as leading to maintenance".

72 Maintenance and champerty, though well known in early English law, "were known almost exclusively as modes of corruption and oppression in the hands of the King's officers and other great men"[68]. And as Buller J noted, in *Master v Miller*[69], "Courts of Equity from the earliest times thought the doctrine [of maintenance as applied to preclude assignment of choses in action] too absurd for them to adopt; and therefore they always acted in direct contradiction to it". But the law of maintenance and champerty was not wholly expelled from this realm of discourse, either by the course of decisions in equity permitting and giving effect to the assignment of choses in action, or by the provisions of s 25 of the *Supreme Court of Judicature Act* permitting such assignments.

73 Assignment of a chose in action "made with the improper purpose of stirring up litigation"[70] would raise questions of maintenance and champerty. But the mere assignment of the proceeds of litigation would not. If the assignment stipulated that the assignee should participate in the litigation, the assignment was lawful only "if he have some legal interest (independent of that acquired by the assignment itself) in the property in dispute; but that where his interest is generated only by the assignment itself, such a stipulation would be improper"[71].

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66 Winfield, "Assignment of Choses in Action in Relation to Maintenance and Champerty", (1919) 35 *Law Quarterly Review* 143 at 143 (Winfield, "Assignment of Choses in Action").

67 (1963) 109 CLR 9 at 26.

68 Winfield, "Assignment of Choses in Action", (1919) 35 *Law Quarterly Review* 143 at 143 referring to Winfield, "The History of Maintenance and Champerty", (1919) 35 *Law Quarterly Review* 50 at 65 and following.

69 (1791) 4 TR 320 at 340 [100 ER 1042 at 1053].

70 Winfield, "Assignment of Choses in Action", (1919) 35 *Law Quarterly Review* 143 at 149.

71 Winfield, "Assignment of Choses in Action", (1919) 35 *Law Quarterly Review* 143 at 152-154 citing, among other cases, *Harrington v Long* (1833) 2 My & K 590 [39 ER 1069]; *Simpson v Lamb* (1857) 7 El & Bl 84 [119 ER 1179]; *Hutley v Hutley*

(Footnote continues on next page)

74 The distinction between the assignment of an item of property and the assignment of a bare right to litigate was regarded as fundamental[72] to the application of the law of maintenance and champerty. But drawing that distinction was not always easy[73]. And it was a distinction whose policy roots were not readily discernible, the undesirability of maintenance and champerty being treated as self-evident. Typical of the way in which the courts expressed this condemnation was the reference by Knight Bruce LJ[74] to the "traffic of merchandizing in quarrels, of huckstering in litigious discord". That the practices were criminal, and also gave rise to civil liability, was treated as sufficient reason to condemn them.

75 Yet practices no different in substance, from some of those condemned so roundly, became commonplace in the law of insolvency. Bankruptcy legislation[75] was held[76] to permit a trustee in bankruptcy who had commenced an action to sell and assign the subject-matter of the action to a purchaser for value. And, of course, the development of the doctrine of subrogation as applied to contracts of insurance[77] qualified the apparent generality of rules against maintenance and champerty.

76 No doubt it was against this background that, at the end of the 19th century, the courts of India and the Privy Council came to consider the

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(1873) LR 8 QB 112; *Rees v De Bernardy* [1896] 2 Ch 437; *Glegg v Bromley* [1912] 3 KB 474.

72 *Prosser v Edmonds* (1835) 1 Y & C Ex 481 [160 ER 196]; *Defries v Milne* [1913] 1 Ch 98; Williams, "Is a Right of Action in Tort a Chose in Action?", (1894) 10 *Law Quarterly Review* 143 at 147; Winfield, "Assignment of Choses in Action", (1919) 35 *Law Quarterly Review* 143 at 160.

73 Compare *Prosser v Edmonds* (1835) 1 Y & C Ex 481 [160 ER 196] and *Dickinson v Burrell* (1866) LR 1 Eq 337.

74 *Reynell v Sprye* (1852) 1 De G M & G 660 at 686 per Knight Bruce LJ [42 ER 710 at 720].

75 For example, *Bankruptcy Act* 1869 (UK), s 25.

76 *Seear v Lawson* (1880) 15 Ch D 426.

77 *Castellain v Preston* (1883) 11 QBD 380.

application of the law of maintenance and champerty in a society where one Indian judge (Phear J) is recorded[78] as having said that:

> "[s]peculation in law proceedings has assumed the dimensions and respectability of an ordinary trade; a large class in the community fattens and grows rich on the spoils of needy suitors; and litigation is maintained without reference to the wishes or interests of the nominal parties."

In *Ram Coomar Coondoo v Chunder Canto Mookerjee*[79], the Privy Council held that the English statues, which founded the then state of the English law, did not apply in India and held[80] that:

> "a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner."

Yet the Privy Council went on to say[81] that:

> "[A]greements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the *bonâ fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, – effect ought not to be given to them."

The basis for such careful watching was not further explained.

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78 Dennis, "The Law of Maintenance and Champerty", (1890) 6 *Law Quarterly Review* 169 at 186.

79 (1876) LR 2 App Cas 186.

80 (1876) LR 2 App Cas 186 at 210.

81 (1876) LR 2 App Cas 186 at 210.

77 What this brief and incomplete survey of the state of the English law, as it stood by the early years of the 20th century, may be understood as revealing is that the law of maintenance and champerty depended more upon assertion of consequences said to follow from the existence of the common law criminal offences of maintenance and champerty, than it did upon any close analysis or clear exposition of the policy to which the rules were intended to give effect. Thus, in *Alabaster v Harness*[82], Lord Esher MR said:

> "The doctrine of maintenance, which appears in the Year Books, and was discussed briefly by Lord Loughborough in *Wallis v Duke of Portland*[83], and more elaborately by Lord Coleridge, CJ, in *Bradlaugh v Newdegate*[84], does not appear to me to be founded so much on general principles of right and wrong or of natural justice as on considerations of public policy. *I do not know that, apart from any specific law on the subject, there would necessarily be anything wrong in assisting another man in his litigation. But it seems to have been thought that litigation might be increased in a way that would be mischievous to the public interest if it could be encouraged and assisted by persons who would not be responsible for the consequences of it, when unsuccessful.* Lord Loughborough, in *Wallis v Duke of Portland*, says that the rule is, 'that parties shall not by their countenance aid the prosecution of suits of any kind, which every person must bring upon his own bottom, and at his own expense.'" (emphasis added)

78 By the early 20th century, the law of maintenance and champerty depended upon the application of qualifications and exceptions hinged, for the most part, about what was an item of property as distinct from a bare right to litigate[85] and what sufficed as a common interest between maintainer and the maintained[86]. In *British Cash and Parcel Conveyors Limited v Lamson Store Service Company Limited*, Fletcher Moulton LJ said[87]:

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82 [1895] 1 QB 339 at 342, cited by Dixon J in *Stevens v Keogh* (1946) 72 CLR 1 at 28.

83 (1797) 3 Ves Jun 494 [30 ER 1123].

84 (1883) 11 QBD 1.

85 For example, *Fitzroy v Cave* [1905] 2 KB 364; *Glegg v Bromley* [1912] 3 KB 474.

86 cf *Holden v Thompson* [1907] 2 KB 489 and, later, *Martell v Consett Iron Co Ltd* [1955] Ch 363.

87 [1908] 1 KB 1006 at 1013-1014.

> "The truth of the matter is that the common law doctrine of maintenance took its origin several centuries ago and was formulated by text-writers and defined by legal decisions in such a way as to indicate plainly the views entertained on the subject by the Courts of those days. But these decisions were based on the notions then existing as to public policy and the proper mode of conducting legal proceedings. Those notions have long since passed away, and it is indisputable that the old common law of maintenance is to a large extent obsolete. ... The present legal doctrine of maintenance is due to an attempt on the part of the Courts to carve out of the old law such remnant as is in consonance with our modern notions of public policy. ... Speaking for myself, I doubt whether any of the attempts at giving definitions of what constitutes maintenance in the present day are either successful or useful. They suffer from the vice of being based upon definitions of ancient date which were framed to express the law at a time when it was radically different from what it is at the present day, and these old definitions are sought to be made serviceable by strings of exceptions which are neither based on any logical principle nor in their nature afford any warrant that they are exhaustive. ... That there is still such a thing as maintenance in the eye of the law and that it constitutes a civil wrong and perhaps a crime is undoubted, and the general character of the mischief against which it is directed is familiar to us all. It is directed against wanton and officious intermeddling with the disputes of others in which the defendant has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse. But in my opinion it is far easier to say what is not maintenance than to say what is maintenance."

As was said in a radically different context (of construction of the *British North America Act* 1867 (Imp))[88]:

> "Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared."

79 By ss 13 and 14 of the *Criminal Law Act* 1967 (UK) criminal and tortious liability for maintenance and champerty were abolished but, like s 6 of the Abolition Act, any rule of law as to the cases in which a contract involving maintenance or champerty is to be treated as contrary to public policy or otherwise illegal was preserved. In 1981, in *Trendtex Trading Corporation v*

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88 *Henrietta Muir Edwards v Attorney-General for Canada* [1930] AC 124 at 134.

Credit Suisse, the House of Lords held[89] that an agreement permitting a bank, which had guaranteed the costs of a party to litigation in which the bank itself was also interested, to sell the party's claims in the litigation "'savours of champerty,' since it involves trafficking in litigation – a type of transaction which, under English law, is contrary to public policy". Accordingly, the assignment of the cause of action was held to be void. Yet effect was given to so much of the agreement as conferred exclusive jurisdiction on a Swiss Court over disputes regarding "its conclusion, interpretation or fulfilment", by staying the action in England with a view to the Swiss Court deciding what effect the invalidity of the assignment, according to English law, had upon the agreement as a whole[90].

80 In the House of Lords, there was no examination of the content of the rule of public policy that was said to be engaged, beyond the reference made by Lord Wilberforce to trafficking in litigation[91]. In the courts below, in *Trendtex*[92], the accepted premise for argument appears to have been that there remained a public policy against at least some forms of maintenance and champerty. The limits of the application of that public policy were identified in the Court of Appeal as to be found in the existence and sufficiency of notions of common interest between the maintainer and the maintained[93].

81 It is important to notice that the House of Lord's conclusion in *Trendtex* (that the provision permitting sale of the cause of action was contrary to public policy – as "savour[ing] of champerty" and involving "trafficking in litigation") was not held to afford a defence to the claim that was made and was not itself a reason to stay the further prosecution of the action. The order for stay that was made was founded upon the exclusive jurisdiction clause, not upon any consideration of public policy concerning maintenance or champerty.

82 Indeed, as the respondents pointed out in the argument of the present appeals, before the enactment of the Abolition Act or its United Kingdom

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89 [1982] AC 679 at 694 per Lord Wilberforce.

90 [1982] AC 679 at 695 per Lord Wilberforce.

91 [1982] AC 679 at 694.

92 *Trendtex Trading Corporation v Credit Suisse* [1980] 3 WLR 367; [1980] 3 All ER 721 (Robert Goff J); [1980] QB 629 (CA).

93 [1980] QB 629 at 653 per Lord Denning MR, 669 per Oliver LJ (with whose reasons Bridge LJ agreed).

progenitor, the *Criminal Law Act* 1967, maintenance or champerty had not been held to constitute a defence to an action on the claim that was maintained, or a ground for staying such an action[94]. Of course it may be said that, at least for the most part, the cases reported about maintenance and champerty were principally directed to whether the maintenance agreement was to be enforced or to whether the named plaintiff had sufficient title to bring the action that was said to be maintained. But that does not detract from the validity of the observation that there was no case where maintenance or champerty was held to be a defence to, or reason enough to stay, the action that was maintained.

Abuse of process?

83 In the present matters, the appellants did not contend that maintenance or champerty provided any defence to the claims made against them. But they did contend that the nature of the funding arrangements made and to be made by Firmstones with retailers warranted the conclusion reached by Einstein J that those arrangements constituted an abuse of process.

84 The appellants sought to encapsulate their submissions on this aspect of the appeals by describing Firmstones' conduct as "trafficking" in the litigation. Expressed in that way, the appellants' submission may be understood as conflating two separate propositions: first, that the funding arrangements constituted maintenance or champerty and, second, that for the maintainer to institute and continue proceedings, in the name of or on behalf of plaintiffs who were thus maintained, was an abuse of process which could be avoided only by ordering a stay of the proceedings. The second of these propositions, about abuse of process, assumed that maintenance and champerty give rise to public policy questions beyond those that would be relevant when considering the enforceability of the agreement for maintenance of the proceedings as between the parties to the agreement.

85 In jurisdictions where legislation has been enacted to the same effect as the Abolition Act, the premise for the second proposition identified is not valid; there are several reasons to reject it. It is neither necessary nor appropriate to decide what would be the position in those jurisdictions where maintenance and champerty may remain as torts, perhaps[95] even crimes.

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94 *Hodges v State of New South Wales* (1988) 62 ALJR 190 at 193 per Brennan J; 77 ALR 1 at 6; *Martell v Consett Iron Co Ltd* [1955] Ch 363 at 421-422 per Jenkins LJ; *Roux v Australian Broadcasting Commission* [1992] 2 VR 577 at 609.

95 But see *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 203.

86 First, and foremost, s 6 of the Abolition Act preserved any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal. It preserved no wider rule of law. The Abolition Act abolished the crimes, and the torts, of maintenance and champerty. By abolishing those crimes, and those torts, any wider rule of public policy (wider, that is, than the particular rule or rules of law preserved by s 6) lost whatever narrow and insecure footing remained for such a rule. As Fletcher Moulton LJ had rightly said[96], nearly a century ago, the law of maintenance and champerty, even then, suffered:

> "from the vice of being based upon definitions of ancient date which were framed to express the law at a time when it was radically different from what it is at the present day".

Secondly, the asserted rule of public policy would readily yield no rule more certain than the patchwork of exceptions and qualifications that could be observed to exist in the law of maintenance and champerty at the start of the 20th century. As Fletcher Moulton LJ had also said[97], it was then "far easier to say what is not maintenance than to say what is maintenance". No certain rule would emerge because neither the content nor the basis of the asserted public policy is identified more closely than by the application of condemnatory expressions like "trafficking" or "intermeddling", with or without the addition of epithets like "wanton and officious"[98].

87 In the present matters, the appellants pointed to a number of matters which together were said to be important. First, there was Firmstones' seeking out of claimants, which the appellants described as "officious intermeddling". Secondly, there was the degree of control which Firmstones would have over the proceedings, the litigants' interests being said to be "subservient" to those of the "intermeddler"[99]. Firmstones' retainer of a solicitor to act for the plaintiffs and represented parties was said not to lessen Firmstones' control of the proceedings but to give rise to possible conflicts of duty for the solicitor. Thirdly, it was said

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96 *British Cash and Parcel Conveyors Limited v Lamson Store Service Company Limited* [1908] 1 KB 1006 at 1013.

97 *British Cash and Parcel Conveyors* [1908] 1 KB 1006 at 1014.

98 *Giles v Thompson* [1994] 1 AC 142 at 164 per Lord Mustill, citing *British Cash and Parcel Conveyors* [1908] 1 KB 1006 at 1014.

99 cf *Clairs Keeley (a Firm) v Treacy* (2004) 29 WAR 479 at 493 [71].

that Firmstones bought rights to litigate and did so with a view to profit. Firmstones was, so it was submitted, "a speculative investor in other persons' litigation".

88 Shorn of the terms of disapprobation, the appellants' submissions can be seen to fasten upon Firmstones' seeking out those who may have claims, and offering terms which not only gave Firmstones control of the litigation but also would yield, so Firmstones hoped and expected, a significant profit to Firmstones. But none of these elements, alone or in combination, warrant condemnation as being contrary to public policy or leading to any abuse of process.

89 As Mason P rightly pointed out[100] in the Court of Appeal, many people seek profit from assisting the processes of litigation. That a person who hazards funds in litigation wishes to control the litigation is hardly surprising. That someone seeks out those who may have a claim and excites litigation where otherwise there would be none could be condemned as contrary to public policy only if a general rule against the maintenance of actions were to be adopted. But that approach has long since been abandoned and the qualification of that rule (by reference to criteria of common interest) proved unsuccessful. And if the conduct is neither criminal nor tortious, what would be the ultimate foundation for a conclusion not only that maintaining an action (or maintaining an action in return for a share of the proceeds) should be considered as contrary to public policy, but also that the claim that is maintained should not be determined by the court whose jurisdiction otherwise is regularly invoked?

90 Two kinds of consideration are proffered as founding a rule of public policy – fears about adverse effects on the processes of litigation and fears about the "fairness" of the bargain struck between funder and intended litigant. In *Giles v Thompson*[101], Lord Mustill said that the law of maintenance and champerty could best "be kept in forward motion" by looking to its origins; these his Lordship saw as reflecting "a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants".

91 Neither of these considerations, whatever may be their specific application in a particular case, warrants formulation of an overarching rule of public policy that either would, in effect, bar the prosecution of an action where any agreement has been made to provide money to a party to institute or prosecute the litigation

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100 (2005) 63 NSWLR 203 at 229 [116].

101 [1994] 1 AC 142 at 164.

in return for a share of the proceeds of the litigation, or would bar the prosecution of some actions according to whether the funding agreement met some standards fixing the nature or degree of control or reward the funder may have under the agreement. To meet these fears by adopting a rule in either form would take too broad an axe to the problems that may be seen to lie behind the fears.

92 It is necessary to bear steadily in mind that questions of illegality and public policy may arise when considering whether a funding agreement is enforceable. So much follows from s 6 of the Abolition Act. Further, to ask whether the bargain struck between a funder and intended litigant is "fair" assumes that there is some ascertainable objective standard against which fairness is to be measured and that the courts should exercise some (unidentified) power to relieve persons of full age and capacity from bargains otherwise untainted by infirmity. Neither assumption is well founded.

93 As for fears that "the funder's intervention will be inimical to the due administration of justice"[102], whether because "[t]he greater the share of the spoils ... the greater the temptation to stray from the path of rectitude"[103] or for some other reason, it is necessary first to identify what exactly is feared. In particular, what exactly is the corruption of the processes of the Court that is feared? It was said, in *In re Trepca Mines Ltd (No 2)*[104], that "[t]he common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses". Why is that fear not sufficiently addressed by existing doctrines of abuse of process and other procedural and substantive elements of the court's processes? And if lawyers undertake obligations that may give rise to conflicting duties there is no reason proffered for concluding that present rules regulating lawyers' duties to the court and to clients are insufficient to meet the difficulties that are suggested might arise.

94 The appellants submitted that special considerations intrude in "class actions" because, so it was submitted, there is the risk that such proceedings may be used to achieve what, in the United States, are sometimes referred to as

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102 *Clairs Keeley* (2004) 29 WAR 479 at 502 [125].

103 *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2003] QB 381 at 413 [85].

104 [1963] Ch 199 at 219-220.

"blackmail settlements"[105]. However, as remarked earlier in these reasons, the rules governing representative or group proceedings vary greatly between courts and it is not useful to speak of "class actions" as identifying a single, distinct kind of proceedings. Even when regulated by similar rules of procedure, each proceeding in which one or more named plaintiffs represent the interests of others will present different issues and different kinds of difficulty.

95 The difficulties thought to inhere in the prosecution of an action which, if successful, would produce a large award of damages but which, to defend, would take a very long time and very large resources, is a problem that the courts confront in many different circumstances, not just when the named plaintiffs represent others and not just when named plaintiffs receive financial support from third party funders. The solution to that problem (if there is one) does not lie in treating actions financially supported by third parties differently from other actions. And if there is a particular aspect of the problem that is to be observed principally in actions where a plaintiff represents others, that is a problem to be solved, in the first instance, through the procedures that are employed in that kind of action. It is not to be solved by identifying some general rule of public policy that a defendant may invoke to prevent determination of the claims that are made against that defendant.

Conclusions and orders

96 It follows that the funding arrangements made and proposed to be made by Firmstones did not constitute a ground to stay the present proceedings. In light of the conclusion reached that the requirements of Pt 8 r 13 were not met when the proceedings were instituted or when Einstein J made his orders, it followed that the proceedings as then constituted could not continue as representative proceedings. It further follows that the orders which were sought in relation to discovery and the giving of opt-in notices were not to be made.

97 Accordingly, each of the appeals to this Court should be allowed with costs. In each matter, the orders made by the Court of Appeal on 31 March 2005 should be set aside and in their place there should be orders that the appeal to that Court is dismissed with costs.

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105 Friendly, *Federal Jurisdiction: A General View*, (1973) at 120, referred to in *In the Matter of Rhone-Poulenc Rorer Inc* 51 F 3d 1293 at 1298 (1995) per Posner CJ.

98 KIRBY J. Two proceedings are before the Court. They raise common issues. Each concerns representative proceedings brought in the Supreme Court of New South Wales for the recovery of amounts allegedly paid under State and Territory franchise licensing legislation. In August 1997 legislation of that type was held invalid under the Constitution[106] as imposing a duty of excise reserved to the Federal Parliament[107]. Those who paid the invalid taxes, not remitted to the taxing authority, want their money back.

99 In the first set of proceedings, the invalid legislation concerns the State and Territory licensing schemes enacted in respect of the sale of tobacco[108]. In the second, it concerns the sale of petroleum products[109]. Special leave was separately granted in the second proceedings to allow an appeal from a judgment of the primary judge (McDougall J)[110] in the Commercial List of the Equity Division of the Supreme Court of New South Wales[111]. This unusual course was taken to permit the parties to those proceedings to make submissions on the common issues. So indeed they did.

100 The two appeals were heard together. However, because there are separate and particular issues raised by the second appeal[112], it is appropriate to deal with it separately. Necessarily, the resolution of the first proceedings will be determinative of the common issues. I have taken into account the submissions made in the second appeal so far as they are relevant to the first proceedings.

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106 *Ha v New South Wales* (1997) 189 CLR 465 at 503.

107 Constitution, s 90.

108 Relevantly, *Business Franchise Licences (Tobacco) Act* 1987 (NSW); *Business Franchise (Tobacco) Act* 1974 (Vic); *Tobacco Products Regulation Act* 1997 (SA); *Tobacco Products (Licensing) Act* 1988 (Q); *Tobacco Business Franchise Licences Act* 1980 (Tas); *Business Franchise (Tobacco and Petroleum Products) Act* 1984 (ACT).

109 Relevantly, *Business Franchise Licences (Petroleum Products) Act* 1987 (NSW); *Business Franchise (Petroleum Products) Act* 1979 (Vic); *Petroleum Products Regulation Act* 1995 (SA); *Transport Co-ordination Act* 1966 (WA); *Petroleum Products Business Franchise Licences Act* 1981 (Tas); *Business Franchise (Tobacco and Petroleum Products) Act* 1984 (ACT).

110 *Trendlen Pty Ltd v Mobil Oil Australia Pty Ltd* [2005] NSWSC 741.

111 By Gleeson CJ and McHugh J on 30 September 2005.

112 *Mobil Oil Australia Pty Ltd v Trendlen Pty Ltd* [2006] HCA 42.

The recovery of invalid taxes

101 *Four cases in this Court*: The first proceedings involve the challenge of a number of wholesalers to a judgment of the Court of Appeal of the Supreme Court of New South Wales adverse to their position[113]. In so deciding, the Court of Appeal reversed the orders of the primary judge in those proceedings (Einstein J)[114]. By those orders, the primary judge had ordered that the proceedings not continue as representative proceedings under the Supreme Court Rules (NSW), Pt 8 r 13 ("the Rules")[115]. The primary judge also concluded that, in so far as the proceedings might be representative proceedings, he would exercise his discretion to stay them permanently, on the ground that they constituted an "abuse of process"[116]. He made further orders consequential upon the foregoing. He refused an order for discovery of the names and addresses of all other members of the class of retailers sought to be joined in the representative proceedings. He also declined to permit existing clients, who consented to that course, to elect to be joined in the proceedings as named plaintiffs[117].

102 All of the subject proceedings arise out of fees payable under the previous tobacco franchise licences legislation. This is therefore the fourth major case arising in this Court out of the scheme for such licences. The first case was *Ha v New South Wales*[118] which held that the New South Wales legislation in that respect was invalid[119]. The second case was *Roxborough v Rothmans of Pall Mall Australia Ltd*[120] which upheld the right of certain retailers, who had bought

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113 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 ("*Fostif*").

114 *Keelhall Pty Ltd t/as "Foodtown Dalmeny" v IGA Distribution Pty Ltd* (2003) 54 ATR 75.

115 These were the applicable rules at the time the proceedings were commenced. The representation of concurrent interests is now provided for in Div 2 of Pt 7 of the Uniform Civil Procedure Rules (NSW).

116 (2003) 54 ATR 75 at [143]. See extract in *Fostif* (2005) 63 NSWLR 203 at 212 [28] per Mason P (Sheller and Hodgson JJA concurring).

117 *Ekaton Corporation Pty Ltd v Shahin Enterprises Pty Ltd* [2003] NSWSC 1018. See *Fostif* (2005) 63 NSWLR 203 at 214 [42]-[43].

118 (1997) 189 CLR 465.

119 (1997) 189 CLR 465 at 503.

120 (2001) 208 CLR 516.

tobacco products from licensed wholesalers, to recover from the latter the amounts representing the purported "licence fees", paid by the retailers between 1 July 1997 and the date that *Ha* was decided[121] and not remitted to the taxing authority. The third case, *British American Tobacco Australia Ltd v Western Australia*[122] concerned the entitlement of the wholesaler to recoup from a State the licence fees paid to the State as an unconstitutional tax, notwithstanding State legislation that purported to regulate, and restrict, such recovery[123]. Now we have these appeals.

103 *The decision in Roxborough*: In *Roxborough*[124], I concluded that the legal solution to claims for the recovery of such unconstitutional taxes had to be framed in a way that was consistent with the postulate of constitutional invalidity. Such claims could not be decided solely by the invocation of private law remedies devised for *inter partes* litigation having no constitutional content. I rejected the appeals in that case by which tobacco retailers (who had already passed the licence fees paid by them on to their consumers) to recover the invalid tax from the wholesaler. I concluded that neither the law of constructive trusts, nor an implied contractual term nor any restitutory principle required, or permitted, such recovery[125].

104 Mine was a minority view. The other members of this Court, explaining their conclusions in differing ways[126], decided that a cause of action to recover the moneys paid by the retailers to the wholesalers did exist and could be prosecuted where the licence fee, of the kind struck down in *Ha*, had failed for constitutional reasons.

105 *The logic of Roxborough*: Whilst adhering to the view about recoverability that I expressed in *Roxborough* (and repeated in *British American Tobacco*[127]) it is appropriate in these proceedings that I should accept as the starting point for my reasons concerning the present attempted recoveries, the law as stated by the majority in *Roxborough*. That law necessarily acknowledges

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121 5 August 1997.

122 (2003) 217 CLR 30 ("*British American Tobacco*").

123 Namely, the *Crown Suits Act* 1947 (WA), s 6(1).

124 (2001) 208 CLR 516 at 563 [124].

125 (2001) 208 CLR 516 at 579-580 [174].

126 As noted by Mason P in *Fostif* (2005) 63 NSWLR 203 at 251 [234].

127 (2003) 217 CLR 30 at 67-69 [91]-[96].

that retailers may, in circumstances analogous to those found to exist in that case, recover monies paid to a wholesaler for the franchise licence fees later held by this Court to be unconstitutional where they were not paid over to the taxing authority.

106 Naturally, this conclusion presents a significant potential legal benefit to the retailers who are entitled to rely on it. This is especially so, because the majority rejected my conclusion that there was an "important constitutional value" that would oblige the retailers, as a condition of their own recovery, first to refund that recovery in an appropriate way to the consumers to whom the tax had been passed on[128]. This Court has held that such an obligation is not part of Australian law. Whilst repeating my doubts, it is also proper that I should proceed on that basis.

107 Approaching the attempted representative actions in this way, I turn to the issues argued in these appeals.

The facts

108 *The background facts*: Many of the facts relevant to an appreciation of the present proceedings are stated in the reasons of Gummow, Hayne and Crennan JJ[129]. Further detail concerning the several proceedings, and their distinct features, are contained in the reasons of Mason P, who wrote the principal reasons in the Court of Appeal[130].

109 In those reasons, Mason P describes the background to the litigation by the retailers to recover the invalid tobacco licensing fees[131]; the actual claims formulated in the proceedings[132]; the applications for discovery presented by the plaintiffs[133]; the applications for summary relief initiated by the defendants before the primary judge[134]; and the terms under which Firmstones Pty Ltd

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128 (2001) 208 CLR 516 at 563 [124], 570 [143], 578-579 [171].

129 Reasons of Gummow, Hayne and Crennan JJ at [23]-[38].

130 (2005) 63 NSWLR 203.

131 (2005) 63 NSWLR 203 at 208-209 [1]-[11].

132 (2005) 63 NSWLR 203 at 209-211 [12]-[20].

133 (2005) 63 NSWLR 203 at 211 [21]-[23].

134 (2005) 63 NSWLR 203 at 211-213 [24]-[35].

("Firmstones")[135], and related companies, undertook the "Project", described as the "tobacco licence fee recovery project", engaged solicitors and approached retailers with a view to recovering licence fees for those retailers in representative proceedings commenced in the Supreme Court for that purpose[136]. Those arrangements were detailed, complex and obviously very carefully planned. It is impossible to understand the conclusions to which the Court of Appeal came without a full appreciation of the entire project, as described by Mason P. I incorporate that description in these reasons. Cases reaching this Court should not be decided on a superficial appreciation of the facts. *A fortiori*, in important cases, involving novel questions of law, the facts require the most careful examination.

110 *Intransigent wholesalers*: In evaluating the issues presented by the appeals, it is also necessary to note further facts, some of them found by the Court of Appeal and others disclosed in uncontradicted evidence.

111 According to this material, following this Court's decision in *Roxborough*, which upheld the recovery rights of the tobacco retailers in that case, many Australian wholesalers (perhaps most) refunded the invalid tobacco licence fees. These were the fees collected from the beginning of the financial year commencing 1 July 1997 until the *Ha* decision was announced but not paid over to the taxing authorities. Some of the largest retailers involved (such as Coles Myer Ltd and Woolworths Ltd) reached prompt agreements with wholesalers to this effect in 2001. In 2002, some 9,500 smaller retailers brought proceedings against the two largest tobacco wholesalers, Philip Morris Ltd and British American Tobacco Australia Ltd. After a hearing, but before judgment, those proceedings were settled. British American Tobacco Australia Ltd refunded 105 per cent of the licence fees to the claimant retailers. Philip Morris refunded 100 per cent. That litigation was funded by a litigation funder, Insolvency Management Fund Ltd ("IMF"). In accordance with its agreement with the retailers concerned, IMF received 30 per cent of the refund[137]. The retailers received the balance.

112 At the same time, Firmstones, another litigation funder, acted for the Shell Company of Australia Ltd and some 900 retailers. These proceedings also resulted in the recovery of settlements from tobacco wholesalers on the basis that

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135 The same descriptions will be used in these reasons as in the reasons of Gummow, Hayne and Crennan JJ at [25].

136 (2005) 63 NSWLR 203 at 215-224 [50]-[87].

137 (2005) 63 NSWLR 203 at 217 [59].

the wholesalers refunded 100 per cent of the licence fees involved[138]. It is a fair inference that, but for the foregoing proceedings, the residual wholesalers would not have refunded the outstanding invalid licence fees to the retailers concerned. On the face of things, they would not have done so voluntarily, merely on the basis of the retailers' apparent legal entitlements in accordance with the decision in *Roxborough*. To extract the refunds, litigation was necessary.

113 This was the context in which Firmstones caused the summonses, the subject of these proceedings, to be issued. As Mason P observed in the Court of Appeal[139]:

> "Firmstone[s] promoted the proceedings now before the Court as a last ditch effort for all of their existing and anticipated clients to be able to recover on what by this stage appeared to be well-established causes of action which had, to date, always culminated in favourable settlements following *Roxborough*."

114 As if in vindication of this assessment of the proceedings, on the very day the present case for the residual tobacco retailers commenced before the primary judge, other proceedings, likewise funded by Firmstones against the Tasmanian wholesaler, Statewide Independent Wholesalers Ltd, were also settled. They were concluded on the basis that the wholesaler undertook to repay so many of its retailers as it was able to identify the full amount of the licence fee levied between 1 July and 5 August 1997 and not remitted to the taxing authority by virtue of the *Ha* decision.

115 Viewed against this background, the proceedings brought against the present appellants were thus no more than an understandable outcome of the subject tobacco wholesalers' intransigence. If litigation was the only way to recover the unremitted licence fees from the remaining wholesalers who were holding out, where others had paid up, Firmstones' commencement of proceedings in the interests of the remaining retailers was scarcely surprising. This was especially so given the looming descent of a limitation bar[140].

116 The prospect that, in the available time, all the residual retailers (or many of them) would begin individual proceedings against the relucant wholesalers, often for relatively small amounts, facing such potentially stalwart resistance and unknown complications, was extremely remote. It is in this context that the

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138 (2005) 63 NSWLR 203 at 217 [56].

139 (2005) 63 NSWLR 203 at 217 [57].

140 In New South Wales, the *Limitation Act* 1969 (NSW), s 14(1)(a). See (2005) 63 NSWLR 203 at 208 [5], 213 [36]-[38].

importance of the representative proceedings initiated by Firmstones becomes easier to understand. And to justify.

117 Furthermore, the context of intransigence on the part of the wholesalers concerned assists in putting Firmstones' fees for the service that it offered to the tobacco retailers into proper perspective. Firmstones, and its principal, Mr Adrian Firmstone, accepted direct exposure to any order for costs in favour of the wholesalers that might be made in the litigation funded by them. In such litigation, Firmstones' fee was not invariably one third of the recovery. According to the evidence, in the case of two large retail groups, a negotiated fee of 25 per cent of the recovery was charged. In return for this variable and agreed fee, Firmstones undertook to conduct the litigation which was expertly defended; to bear all legal costs involved in the litigation; and to indemnify the individual retailers concerned against any adverse costs orders in favour of the wholesalers, should such adverse orders eventuate.

118 *The funder's obligations*: In the present proceedings, these promises involved no small commitment. Firmstones were required to provide security for costs in the sum of $1 million; to fund the proceedings involving voluminous evidence over three days before the primary judge; to bear the further costs of two days of hearing in the Court of Appeal; and now to pay additional costs in this Court. The retailers concerned were fully informed as to the terms that Firmstones offered. Not a few of the retailers apparently concluded that, given the choice, they were better off surrendering a third of their recovery instead of exposing themselves, individually, to the perils and costs of litigation and the chimera of total recovery. For the retailers, it seems that a bird in [Firmstones'] hand was worth two in the [litigious] bush.

119 Although the terms of Firmstones' agreement with individual retailers included the power to settle proceedings, this power was significantly qualified. It was subject to a precondition that Firmstones had first to recover a settlement that exceeded 75 per cent of the amount paid by the retailer as licence fees. Moreover, the authority which Firmstones proposed should be granted by retailers who "opted in" to the proceedings was to be on the same basis. Material before the Court of Appeal suggested that the conditions that Firmstones offered to the tobacco retailers for funding the present proceedings were more favourable than those approved by the Federal Court of Australia in *Re Addstone Pty Ltd (In Liq)*[141] and comparable to those approved in the United Kingdom[142] in proceedings of a similar kind, taken in that country.

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141 (1998) 83 FCR 583 at 590 per Mansfield J. There, the litigation funder was entitled to approximately 35 per cent of the net recovery.

142 *Re Claims Direct Test Cases* [2003] 4 All ER 508. See (2005) 63 NSWLR 203 at 236 [143].

120 To lawyers raised in the era before such multiple claims, representative actions and litigation funding, such fees and conditions may seem unconventional or horrible. However, when compared with the conditions approved by experienced judges in knowledgeable courts in comparable circumstances, they are not at all unusual. Furthermore, the alternative is that very many persons, with distinctly arguable legal claims, repeatedly vindicated in other like cases, are unable to recover upon those claims in accordance with their legal rights.

The legislation and Rules of the Court

121 *The legislation*: As explained in the reasons of Gummow, Hayne and Crennan JJ, the Fostif proceedings against Campbells[143] have been accepted as typical of the others in the present appeals. They were commenced under the Rules of the Supreme Court of New South Wales as in force at the times when the primary judge and the Court of Appeal decided these proceedings. Those rules were made in accordance with, and under, Pt 9 of the *Supreme Court Act* 1970 (NSW). In terms of their provisions[144], the relevant rules were addressed to the Supreme Court of New South Wales to be read in accordance with the "Overriding Purpose Rule". This rule required that Court to facilitate the "just, quick and cheap resolution of the real issues" in proceedings and to give effect to this "overriding purpose" when exercising powers given by the rules or when interpreting any particular rule.

122 Since the present proceedings were decided in the Court of Appeal, a significant portion of the rules, including Pt 8 r 13 and Pt 1 r 3, have been repealed[145]. This occurred upon the commencement of s 9 of the *Civil Procedure Act* 2005 (NSW). The purposes of that Act included the introduction of the Uniform Civil Procedure Rules (NSW). It was not suggested that, in deciding the complaints of error on the part of the Court of Appeal, this Court should do otherwise than to evaluate the decision of the Court of Appeal against the criteria stated in the rules applicable when the proceedings were decided. However, to the extent that the orders of the Court of Appeal remitted the proceedings to the

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143 Reasons of Gummow, Hayne and Crennan JJ at [29].

144 Supreme Court Rules (NSW), Pt 1 r 3(1), (2).

145 With effect from 15 August 2005. See Supreme Court Rules (Amendment No 405) (NSW), Sched 1. The rules governing representative proceedings and the overriding purpose in relation to the conduct of court proceedings have continued in ostensibly the same form (with some amendments). See *Civil Procedure Act* 2005 (NSW), Pt 6 Div 1; Uniform Civil Procedure Rules (NSW), Pt 2 r 2.1, Pt 7 r 7.4.

Equity Division to continue as representative proceedings[146], they would obviously have to continue under the new rules, as by then applicable.

123 The contrasting provisions for representative proceedings contained in the *Federal Court of Australia Act* 1976 (Cth)[147] are described in the reasons of Gummow, Hayne and Crennan JJ. Also mentioned there is the *Maintenance, Champerty and Barratry Abolition Act* 1993 (NSW) ("the Abolition Act"), by which the common law offence of maintenance (including champerty) was abolished in New South Wales, but subject to the preservation of "any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal"[148].

124 In considering the ambit of the continuing operation of the common law rules of maintenance and champerty upon contracts and court proceedings, this Court is, of course, stating the common law for the whole of Australia[149]. There are provisions equivalent to the Abolition Act in some other Australian States[150]. To some degree, the Abolition Act reflects developments that were already occurring in the common law[151]. However, because the subject proceedings were brought in New South Wales, any exposition of the law as it affects abuse of process and public policy in these proceedings, must conform to the applicable provisions of the Abolition Act.

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146 See (2005) 63 NSWLR 203 at 261 [292].

147 ss 33A-33ZJ. See reasons of Gummow, Hayne and Crennan JJ at [47]-[48].

148 The Abolition Act, s 6. See reasons of Gummow, Hayne and Crennan JJ at [66]-[67].

149 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-567; *Lipohar v The Queen* (1999) 200 CLR 485 at 507-508 [50]-[51] per Gaudron, Gummow and Hayne JJ, 551-553 [167]-[170] of my reasons; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 514 [2], 517-518 [15] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

150 *Wrongs Act* 1958 (Vic), s 32 (since 1969) and *Criminal Law Consolidation Act* 1935 (SA), Sched 11 (since 1992). In the United Kingdom, the *Criminal Law Act* 1967 (UK), ss 13 and 14 abolished criminal and tortious liability for maintenance and champerty. See Fleming, *The Law of Torts*, 9th ed (1998) at 689.

151 New South Wales Law Reform Commission, *Barratry, Maintenance and Champerty*, Discussion Paper No 36, (1994) at 7; cf Australian Law Reform Commission, *Managing Justice - A review of the federal civil justice system*, Report No 89, (2000) at 310-311 [5.25].

125 *The applicable rules*: The history of maintenance and champerty in the law of England is described in the reasons of Gummow, Hayne and Crennan JJ[152]. The origins and course of development of that body of law are illustrated there, with reference to the differing practice of common law and of equity[153]; the different approaches deemed proper in England and at least one of its colonies[154]; and the gradual realisation that some of the earlier judicial strictures against maintenance and champerty were in need of reconsideration in the light of modern conditions, analogous legal developments, practices in particular jurisdictions and the real impediments that commonly exist to affordable access to justice[155]. I will not repeat any of this material. It is usefully supplemented in the reasons of Mason P in the Court of Appeal[156].

The issues

126 Four issues were argued in these proceedings. The two principal issues were as follows:

(1) *The abuse of process issue*: This was the primary way in which, both in their oral submissions[157] and in their written submissions[158], the appellants challenged the decision of the Court of Appeal and sought restoration of the stay and other relief provided by the primary judge. The appellants submitted that the proceedings, funded by Firmstones, amounted to "trafficking in litigation", which was an abuse of process *per se*. As well, particular aspects of the arrangement were criticised, namely the control over the litigation enjoyed by Firmstones as the funder; the alleged subservience of the individual litigants' interests to those of an "intermeddling" stranger; the role assumed by the funder in "buying and

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152 Reasons of Gummow, Hayne and Crennan JJ at [68]-[82].

153 Reasons of Gummow, Hayne and Crennan JJ at [68]-[72].

154 Reasons of Gummow, Hayne and Crennan JJ at [76] by reference to *Ram Coomar Coondoo v Chunder Canto Mookerjee* (1876) LR 2 App Cas 186 at 210.

155 cf *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 79 ALJR 1620 at 1678-1679 [316]-[318]; 219 ALR 403 at 480-481.

156 *Fostif* (2005) 63 NSWLR 203 at 224-229 [88]-[112].

157 (2006) HCATrans 160 at [65]-[70] ["The primary submission … is that the continuation of the proceedings as a representative action is an abuse of the process of the Court and contrary to public interest"].

158 Relying on *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 at 702 per Lord Roskill; *Giles v Thompson* [1994] 1 AC 142 at 164 per Lord Mustill.

selling rights" to litigate before the courts; and the consequential involvement of those courts in the facilitation of what was described as an offensive and champertous ("spoils sharing") scheme[159];

(2) *The "same interest" issue*: The appellants, alternatively, submitted that the Court of Appeal had erred in disturbing the primary judge's conclusion that the plaintiffs had failed to show, within the terms of Pt 8 r 13(1) of the Rules, that "numerous persons had the same interest" in the proceedings warranting the commencement and continuance of the proceedings as a representative action. This issue was addressed by the primary judge and by the Court of Appeal in terms of the respective points of similarity and diversity in the several "interests" revealed in the claims of the numerous tobacco retailers involved in pursuing their entitlements against the wholesalers. However, in argument before this Court[160], the issue took quite a different turn. The debate shifted from being (as heretofore) about the potential disparities in the several interests of the many retailers. No longer was the issue viewed in terms of the retailers' personal agreements with the wholesalers; individual invoices disclosing or not disclosing the invalid tax; individual understandings - if that be relevant - as to what would and should happen in the event of invalidation; individual interests having regard to different statutory provisions in different States[161]; and different positions under the applicable limitations statutes. Instead, a wholly new focus was raised by the Court itself during argument.

127 In this way, a submission came to be formulated based upon the language of Pt 8 r 13(1) of the Rules. The new argument questioned whether the language of that sub-rule required those who commenced the proceedings to "have numerous persons who have the same interest ... *at the time of commencement*"[162]. It is this argument, critical to the application of the Rules permitting a representative action to be organised, that the reasons of Gummow, Hayne and Crennan JJ treat as determinative of these appeals[163].

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159 See eg (2005) 63 NSWLR 203 at 215 [48].

160 See [2006] HCATrans 160 at [1565]-[1570], [1680].

161 (2005) 63 NSWLR 203 at 248-249 [215]-[224] referring to *Business Franchise Licences (Tobacco) Act* 1987 (NSW), s 41(3) which was different from provisions in the legislation of other jurisdictions except the Australian Capital Territory.

162 See [2006] HCATrans 160 at [1660]-[1680].

163 Reasons of Gummow, Hayne and Crennan JJ at [49]-[60].

128 There are two subsidiary, and consequential, issues that follow the resolution of the first two issues. They arise only if the first two issues are decided in favour of the respondents. In such circumstances, it is necessary to consider whether the Court of Appeal erred in reversing the decision of the primary judge on the ancillary questions. These issues, numbered as the third and fourth issues, are as follows:

(3) *The discovery and interrogatories issues*: The primary judge refused discovery to the respondents and rejected their applications to administer interrogatories to the appellants so that the representative proceedings could be constituted out of the appellants' records. The relevant records, it was suggested, would provide details of *all* the retailers who had paid the unlawful licence fee to the appellants. Securing them would enable Firmstones to contact all those eligible to "opt in" to the proceedings on the terms proposed. For its part, the Court of Appeal concluded that "at an appropriate stage in the proceedings" the lead plaintiffs would be entitled to discovery, as asked, as to the details of all transactions falling within the scope of the representative proceedings so far as they "touch on matters in dispute" as were necessary for the "fair trial of the issues"[164]. Having indicated that view, the Court of Appeal concluded that the application for such relief was premature at the stage the proceedings had reached before it. At that time, by the appellants' choice, their defences had not yet been filed. Whilst indicating that the primary judge's refusal of discovery *in limine* was erroneous, the Court of Appeal, without itself making the orders sought, resolved the issue by remitting the proceedings for trial, such trial to be continued as representative proceedings, consistently with its reasons[165]; and

(4) *The constitutional issues*: Finally, the appellants raised constitutional issues. They contended that, if the respondents' actions were not to be permanently stayed as an abuse of process at common law and had sufficiently engaged the rules governing representative actions in the Supreme Court, proceeding in that way would amount to a constitutionally impermissible attempt to impose on the Supreme Court, in the exercise of federal jurisdiction, a duty to make orders other than in relation to a "matter", as contemplated by Ch III of the Constitution. According to the appellants, the proceedings were in federal jurisdiction because they ultimately arose out of the constitutional invalidation of the tobacco licence fees and the legal consequences of that decision. This, the appellants argued, was the eventual foundation of the respondents' claims.

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164 (2005) 63 NSWLR 203 at 258 [271].

165 (2005) 63 NSWLR 203 at 258-259 [272]-[275], 261 [292].

> On that basis, the claims enlivened the requirements of the Constitution for the exercise of the judicial power of the Commonwealth. Within federal jurisdiction[166], the appellants submitted that the respondents' attempts to "create litigious controversies" where they did not otherwise exist and to use court processes of discovery and interrogatories to create controversies that did not previously need to be "quelled"[167] involved an impermissible distortion of federal judicial power. On that footing too, the present appellants claimed relief from this Court[168].

129 In my opinion, the Court of Appeal was correct in the determinations it made on each of the first three issues. As to the fourth issue, there is no substance in the appellants' constitutional objection to the representative proceedings, as contemplated by the applicable rule, or to the ancillary procedures of discovery and interrogatories (or opt-in procedures) designed to render such proceedings effective. Accordingly, the appellants' appeals fail. I will now proceed to explain these conclusions.

No abuse of process warranted a stay

130 *The representative facility*: As the Court of Appeal repeatedly pointed out in its reasons, it is essential to differentiate between the so-called *jurisdictional* issue (of whether the respondents had validly engaged the representative procedure permitted by the Rules of the Supreme Court) and the *discretionary* issue, concerning the conditions under which any such representative proceedings should be allowed to continue[169].

131 This Court clarified that distinction in *Carnie v Esanda Finance Corporation Ltd*[170]. Addressing the provisions of the same rules, applicable in that case (Pt 8 r 13), McHugh J said:

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166 *British American Tobacco* (2003) 217 CLR 30 at 44 [12] per Gleeson CJ, 50 [35] per McHugh, Gummow and Hayne JJ, 73 [111-112] of my reasons.

167 cf *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 458-459 [242] per Hayne J.

168 [2006] HCATrans 160 at 1350-1355. The appellants left the oral argument on this issue to Mobil Oil Australia Pty Ltd ("Mobil"), the appellant in the concurrent appeal. However, it pressed the argument in support of the reversal of the judgment below.

169 (2005) 63 NSWLR 203 at 239 [163].

170 (1995) 182 CLR 398 at 427 ("*Carnie*").

> "[A] plaintiff and the represented persons have 'the same interest' in legal proceedings when they have a community of interest in the determination of any substantial question of law or fact that arises in the proceedings. Other factors may make it undesirable that the proceedings should continue as a representative action, but that is a matter for the exercise of discretion, not jurisdiction."

132 In *Carnie*, each member of this Court acknowledged the ample character of the discretion afforded by the rules, where they applied, whereby a judge of the Supreme Court is obliged to consider whether the particular case is one appropriate to commence or continue as a representative action or whether that judge should "otherwise order"[171]. In making that decision, the judge of the Supreme Court is invested with very large powers that permit the taking into account of the types of consideration mentioned by Gleeson CJ when *Carnie* was decided in the Court of Appeal[172].

133 As the Court of Appeal pointed out in the present proceedings, the observations of Gleeson CJ in *Carnie* were approved by this Court[173], although this Court's orders reversed the disposition adopted by the majority of the Court of Appeal[174]. But, unless the issue of *jurisdiction* (or power) is separated from issues more appropriately considered as procedural and *discretionary*, error is bound to occur. The Court of Appeal obviously considered that this was what had occurred before the primary judge in the present case.

134 *Hostility to such proceedings*: Despite the ample terms in which the power was granted to the Supreme Court, by its rules, the primary judge had given effect to an *a priori* view that was hostile to representative proceedings. This was so although, once the preconditions for the constitution of representative proceedings were established, the proper focus of the primary

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171 (1995) 182 CLR 398 at 404-405 per Mason CJ, Deane and Dawson JJ, 408-410 per Brennan J, 415, 426 per Toohey and Gaudron JJ, 430-431 per McHugh J.

172 *Esanda Finance Corp Ltd v Carnie* (1992) 29 NSWLR 382 at 388. The considerations included "whether or not consent is required from persons who are to be group members in representative proceedings, the position of persons under disability, the right of a group member to opt out of a representative proceeding, alterations to the description of the group, settlement and discontinuance of proceedings, and the giving of various notices to group members".

173 See *Fostif* (2005) 63 NSWLR 203 at 239-240 [164] referring to *Carnie* in this Court (1995) 182 CLR 398 at 405 per Mason CJ, Deane and Dawson JJ, 431 per McHugh J.

174 See *Fostif* (2005) 63 NSWLR 203 at 239-240 [164]; *Carnie* (1995) 182 CLR 398.

judge's concern should have been upon the discretionary considerations upon which such proceedings should be allowed to continue in a way which was fair to opponents, protective of all those participating in the proceedings and defensive of the proper administration of justice.

135 *A priori* hostility to representative actions was a feature of several English decisions in the twentieth century following the wrong turning that was taken by the English Court of Appeal in *Markt & Co Ltd v Knight Steamship Co Ltd*[175]. Yet, both in *Carnie*[176] and in *Wong v Silkfield Pty Ltd*[177], this Court has been at pains to correct that approach so as to facilitate representative proceedings in which, under judicial supervision, the appropriate discretionary protections can be put in place.

136 The present appeals represent an attempt to turn back the judicial clock. This Court should adhere to the approach that it explained in *Carnie* and in *Wong*. It is no part of this Court's function to frustrate the achievement of the representative procedures provided for in the rules, so long as such procedures are valid and involve no offence to the Constitution.

137 In considering accusations that the funding arrangements introduced by Firmstones into the present proceedings amounted to an abuse of process, it is necessary to keep in mind the particular demands inherent in representative proceedings: the need to marshal effectively substantial resources; to gather voluminous evidence; to retain and pay competent counsel over a significant period; often to provide in advance substantial security for costs; to attend both to the general issues and to those particular to identified subcategories and individual cases; and to prove consequential losses usually with the evidence of several experts. In proceedings such as the present, faced with such daunting requirements, the ordinary tobacco retailer would commonly give up[178]. If the only way to vindicate legal rights was to bring individual proceedings or to find others with exactly the same interest, most ordinary retailers would abandon hope. They would not enforce legal rights of action belonging to them, existing in theory by analogy with the decision of this Court in *Roxborough*. They would withdraw rather than venture upon such expensive, stressful, perilous litigation. They would do this despite the earlier recovery by retailers of the unremitted taxes disgorged in circumstances apparently indistinguishable from their own.

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175 [1910] 2 KB 1021.

176 (1995) 182 CLR 398 at 404 per Mason CJ, Deane and Dawson JJ, 408 per Brennan J, 421 per Toohey and Gaudron JJ, 427 per McHugh J.

177 (1999) 199 CLR 255 at 260-263 [11]-[17], 266-267 [27].

178 See (2005) 63 NSWLR 203 at 234 [131].

Individually, for most or all of them, enforcement of legal rights would not be worth the cost, risk and effort.

138 It is against the inherent inequalities, presented by these litigious facts of life, that a representative action may, under proper conditions, afford a litigant with an individual claim a justifiable prospect to secure practical access to that litigant's legal rights in association with many others. The individual claim may (as in the case of many tobacco retailers in these proceedings) be comparatively small and hardly worth the expense and trouble of suing. But the aggregate of the claims of those willing to proceed together, as proposed by a funder and organiser such as Firmstones, might be very large indeed. What is a theoretical possibility, as an individual action or series of actions, needs therefore to be converted into a practical case by the intervention of someone willing to undertake a test case[179], followed by others willing to organise litigants in a similar position, and under appropriate conditions, to recover their legal rights by helping them to act together.

139 *The decisions in Carnie and Wong*: Obviously, there are some legitimate concerns about representative actions, and litigation funding[180]. However, it is important to assess accusations of "abuse of process" against the standards accepted by this Court in *Carnie*, freed from preconceptions and from hostility inherited from the thinking of judges in earlier and different times.

140 In *Carnie*, Mason CJ, Deane and Dawson JJ described the representative action, as provided by the Rule in question in these appeals, as designed[181]:

> "… to facilitate the administration of justice by enabling parties having the same interest to secure a determination in one action rather than in separate actions … It may be [the Rule] extends to a significant common interest in the resolution of any question of law or fact arising in the relevant proceedings. Be that as it may, it has now been recognised that persons having separate causes of action in contract or tort may have 'the same interest' in proceedings to enforce those causes of action."

141 *Prima facie*, then, it will not be an abuse of process, under the rules, for such persons to commence and continue proceedings for such purposes. On the contrary, this is the very object of the rules permitting representative actions.

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179 As, in a sense, *Roxborough* (2001) 208 CLR 516 was.

180 See (2005) 63 NSWLR 203 at 229-232 [114]-[123]; Aitken, "'Litigation Lending' after *Fostif*: An Advance in Consumer Protection, or a Licence to 'Bottomfeeders'?", (2006) 28 *Sydney Law Review* 171 at 176-180.

181 (1995) 182 CLR 398 at 404.

Because the rules in question were made with statutory authority, they must be given effect by courts according to their terms and purposes, unless doing so would involve the courts in unlawfulness, or because the rules exceeded the grant of power or involved a breach of the Constitution[182]. No one suggested that the rules were *ultra vires*.

142 The Court of Appeal was therefore correct to read this Court's decisions in *Carnie* and *Wong* as affirming a "more liberal [approach] in allowing representative actions to proceed"[183]. As McHugh J put it[184]: "[i]n the Age of Consumerism, it is proper that this should be so"[185]. If, to be effective, this necessitates at once a broader approach to the availability of representative actions and less hostility to litigation funding under judicially supervised conditions, so much is inherent in a procedure designed to enable parties with legal claims in the same interest to be organised into one action rather than fobbed off with the theoretical (but practically unavailable) entitlement to bring a multitude of individual actions separately[186].

143 *Real access to legal rights*: Apart from the foregoing considerations, it is important to recognise how exceptional it is for a court to bring otherwise lawful proceedings to a stop, as effectively the primary judge did in this case. It is very unusual to do so by ordering the permanent stay of such proceedings[187]. The Court of Appeal recognised this consideration. Properly, it emphasised that it was for the appellants to establish that the respondents' proceedings constituted an abuse of process[188].

144 The reason why it is difficult to secure relief of such a kind is explained by a mixture of historical factors concerning the role of the courts; constitutional considerations concerning the duty of courts to decide the cases people bring to

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182 And hence to the fourth issue.

183 *Carnie* (1995) 182 CLR 398 at 429 per McHugh J (referring to the judgment of Toohey and Gaudron JJ).

184 *Carnie* (1995) 182 CLR 398 at 429.

185 See (2005) 63 NSWLR 203 at 255 [254].

186 cf (2005) 63 NSWLR 203 at 238 [160]. See especially Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46, (1988) at 8-9 [13]-[14].

187 *Williams v Spautz* (1992) 174 CLR 509 at 518-520.

188 (2005) 63 NSWLR 203 at 237 [151].

them; and reasons grounded in what we would now recognise as the fundamental human right to have equal access to independent courts and tribunals[189]. These institutions should be enabled to uphold legal rights without undue impediment and without rejecting those who make such access a reality where otherwise it would be a mere pipe dream or purely theoretical.

145 The importance of access to justice, as a fundamental human right which ought to be readily available to all, is clearly a new consideration that stimulates fresh thinking about representative or "grouped" proceedings[190]. It is this consideration that has informed the decisions of other Australian appellate courts[191] on such questions and also a decision of the Supreme Court of Appeal of South Africa[192].

146 *No abuse of process*: When the foregoing considerations are taken into account, I agree with the conclusion reached on this issue in the reasons of Gummow, Hayne and Crennan JJ[193]. In these appeals the appellants failed to demonstrate an abuse of process to warrant the primary judge's conclusion that they were entitled to a permanent stay on that basis[194].

147 I also agree with the reasons given by the Court of Appeal on this issue. In those reasons, Mason P successively rejects the arguments advanced by the appellants to sustain the primary judge's conclusion that the proceedings, in their existing form, constituted an abuse of process[195]. Thus, Mason P dismissed the criticisms addressed to the role of Mr Firmstone and his company[196]. He was

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189 See International Covenant on Civil and Political Rights, Art 14.1.

190 *Thai Trading Co v Taylor* [1998] QB 781 at 786 per Millett LJ; cf Aitken, "'Litigation Lending' after *Fostif*: An Advance in Consumer Protection, or a Licence to 'Bottomfeeders'?" (2006) 28 *Sydney Law Review* 171 at 177.

191 *Clairs Keeley v Treacy (a Firm)* (2004) 29 WAR 479 at 494 [73]-[74], 502 [124] per Steytler, Templeman and McKechnie JJ; *Clairs Keeley (A Firm) v Treacy* [2005] WASCA 86 at [58]-[59] per Steytler P, Roberts-Smith and McLure JJA.

192 *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 (6) SA 66 at 78-80 [42]-[46] per Southwood AJA (Harms, Cameron, Conradie and Lewis JJA concurring).

193 Reasons of Gummow, Hayne and Crennan JJ at [83]-[95].

194 See also Gleeson CJ at [1].

195 (2005) 63 NSWLR 203 at 215-237 [46]-[152].

196 (2005) 63 NSWLR 203 at 215-220 [50]-[74].

unconvinced by the criticisms voiced as to the involvement of the solicitor retained by the funder, Mr Richards[197]. He rejected the generalised complaints that the proceedings were likely *per se* to lead to an abuse of process, were contrary to public policy, as such, and constituted an impermissible "trafficking in litigation"[198]. He faced squarely the fact that it was inconceivable that the individual retailers, with an average claim of $1,000, would hazard the litigious risks and costs of pursuing their legal rights, were it not for the litigation funding that permitted this to happen and organised it so that it would[199].

148 I find all of the general and specific reasons in the Court of Appeal's decision convincing. I would endorse the reasons in the terms in which they are stated. They reinforce the conclusion on this issue expressed in the reasons of Gleeson CJ and the reasons of Gummow, Hayne and Crennan JJ in this Court. Moreover, they suggest the need for a facultative approach to the representative procedures envisaged by the rules. As I will show, that approach is missing from the reasons of the majority in this Court, when they turn to the second issue. With respect, it is wholly missing from the reasons which Callinan and Heydon JJ have written[200]. In my opinion those reasons disclose an attitude of hostility to representative procedures that is a left-over of earlier legal times. They are incompatible with the contemporary presentation of multiple legal claims. And, most importantly, they are fundamentally inconsistent with the rules made under statutory power and the need to render those rules effective.

149 *Conclusion: Court of Appeal was correct*: It follows that the Court of Appeal was correct to find error in the primary judge's conclusion that the proceedings should be permanently stayed as an abuse of process. This Court should affirm the Court of Appeal's conclusion. No separate consideration of the suggestion that the proceedings should be stayed as contrary to public policy is necessary. The suggested arguments of public policy, as they were presented, effectively amount to the same bases upon which the abuse of process was propounded. They involved no different or separate point. There was no abuse of process.

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197 (2005) 63 NSWLR 203 at 220-224 [75]-[87].

198 (2005) 63 NSWLR 203 at 224-232 [88]-[123].

199 (2005) 63 NSWLR 203 at 237 [148]-[149].

200 Reasons of Callinan and Heydon JJ at [267]-[284].

The representative proceeding rules were engaged

150 *The applicable rule*: To deal with the second issue, it is useful to repeat the applicable provision of the rules relating to these proceedings. Part 8 r 13 relevantly provided:

> "Representation: concurrent interests
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> 13 (1) Where numerous persons have the same interest in any proceedings the proceedings may be commenced, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
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> …
>
> (4) A judgment entered or order made in proceedings pursuant to this rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.
>
> (5) An application for leave under subrule (4) shall be made by motion, notice of which shall be served personally on the person against whom it is sought to enforce the judgment or order.
>
> (6) Notwithstanding that a judgment or order to which an application under subrule (5) relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from the liability."

151 In *Carnie*[201], this Court made it clear that numerous persons may have the "same interest", and may thus satisfy the precondition for the engagement of Pt 8 r 13, although each person has a separate cause of action. Clearly, this is so because, otherwise, the rule would misfire. It would have a negligible application. Plainly, this would be contrary to its purpose. Moreover, all of the

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201 (1995) 182 CLR 398 at 404 per Mason CJ, Deane and Dawson JJ, 408 per Brennan J, 420-422 per Toohey and Gaudron JJ, 427-428 per McHugh J. See also *Fostif* (2005) 63 NSWLR 203 at 238 [158].

reasons in *Carnie* emphasised (as has been a common theme in many recent decisions of this Court[202]) that it is necessary to apply the language of the rule in question in preference to judicial paraphrases of it[203]. Such paraphrases, especially in older cases, can easily reflect the earlier judicial hostility to representative or grouped proceedings. That is why it is best to avoid them.

152 In order to make the rule effective for the achievement of its purpose and to fulfil the "Overriding Purpose Rule" of the rules themselves[204], the meaning and application of Pt 8 r 13 must thus be construed in a beneficial and facultative way. This is the general approach now taken by this Court to the construction of statutory language. It applies equally to court rules made under statutory power[205]. With respect, the majority in this Court have overlooked these important considerations of approach[206]. By their very nature, representative proceedings facilitate the "just, quick and cheap resolution of the real issues" where plaintiffs have the same interest. *A priori*, that is the "overriding purpose" of Pt 8 r 13. The achievement of this purpose should not be subverted by a unduly narrow and restrictive interpretation of the language of the Rule itself.

153 *The propounded interpretation*: The essential holding in the reasons of the majority is that the requirements of Pt 8 r 13(1) of the Rules were not met in the present proceedings[207]. The content of this holding is made clear by what follows. Thus, in the reasons of Gummow, Hayne and Crennan JJ, their Honours say:

> "Neither when the proceedings were instituted, nor when Einstein J made his orders, were there numerous persons having the same interest in the proceedings that were commenced. The only persons who then had an interest in the proceedings were the named plaintiffs."

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202 See eg *Weiss v The Queen* (2005) 80 ALJR 444 at 452 [31]; 223 ALR 662 at 671 and cases there cited.

203 See *Fostif* (2005) 63 NSWLR 203 at 242 [183].

204 Pt 1 r 3(1), (2). See above at [121].

205 *Bropho v Western Australia* (1990) 171 CLR 1 at 20 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382.

206 cf my reasons in *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 264-266 [35]-[41].

207 Reasons of Gummow, Hayne and Crennan JJ at [58], [60]; reasons of Callinan and Heydon JJ at [214]-[226].

154 To understand this ruling and the "more deep-seated question" which was said to have emerged "in the course of oral argument"[208], it is necessary to appreciate that the ruling turns upon an extremely narrow view of the operation of Pt 8 r 13(1). Moreover, it is a view that did not constitute the basis upon which, up to the hearing in this Court, the appellants, in their oral or written argument, were complaining about the failure of the respondents to establish that the proceedings lacked the "same interest".

155 Thus, in their written submissions to this Court, the complaints of the appellants were that the respondents had merely shown that there "may be some common interest" of law or fact to be resolved in the representative proceedings; had defined the represented persons in such a self-fulfilling way as to preclude any real controversy over the propounded "same interest"; had presented a claim where the common issue was "illusory"; and had failed to seek any common relief.

156 These issues, which the appellants brought to this Court to "quell" in resolving their controversy with the respondents, were thus quite different from the ground upon which the reasons of the majority now find in the appellants' favour. This does not mean that the new point lacks substance. Sometimes, the examination of issues of construction or legal principle by this Court can produce fresh insights which others have earlier failed to perceive. Those others may have been influenced by previous assumptions about the content of the law or the approach that should be taken to new legal ideas. But when a new insight arises in this Court for the first time, it demands careful scrutiny of the point out of respect for the many who have gone before who, by hypothesis, have missed it[209]. They may all have been wrong. But, then again, they may not.

157 *Rejection of the interpretation*: There are several reasons why, in my view, the interpretation given to Pt 8 r 13 of the Rules in the reasons of the majority should be rejected.

158 First, the language of Pt 8 r 13(1), referring to the "same interest" postulates the existence of the "same interest" at a time *before* any proceedings have commenced. The reasons of the majority place their emphasis on the expression of the "same interest" in the proceedings *as commenced*. With respect, this is to invert the language of the sub-rule. The existence of the "same interest" is a precondition to the commencement of the proceedings. It is thus addressed to something wider, and different, from the exact way in which the

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208 Reasons of Gummow, Hayne and Crennan JJ at [51].

209 cf *Combet v The Commonwealth* (2005) 80 ALJR 247 at 307-308 [279]-[282] of my reasons; 221 ALR 621 at 697-698.

"interest" is expressed in the proceedings, once commenced. Indeed, in the context, the "same interest" must refer to an "interest" that is generic. It may be informed by, but not limited strictly to, the legal specification of the "proceedings" thereafter commenced (and continued). Once this time sequence in the text of the sub-rule is understood, it is plain that the "same interest" postulated may be broader than, and somewhat different from, the pleadings by which the "proceedings", when commenced, are expressed.

159 Secondly, this approach to the meaning of the "same interest" on the part of "numerous persons", before any "proceedings" may be commenced, is also a construction more likely to advance the purposes of the rule. That purpose is, exceptionally, to permit representative proceedings to be commenced and continued in the circumstances nominated. If the narrow view favoured in the reasons of the majority is adopted, the ambit of the application of the rule is severely cut back. The necessity of the "same interest" is not treated, as the text and purpose of the rule suggests it should be, as a precondition to the valid commencement of proceedings and as something that existed separately and independently from such proceedings. Instead, it is assimilated to the pleading of the proceedings. That approach turns the rule on its head and impedes its purpose. The purpose is to facilitate the litigation in the one proceeding of claims in respect of interests shared by "numerous persons" *before* such proceedings are commenced.

160 This Court should not frustrate the achievement of the purpose of the rule. On the contrary, as in *Carnie* and *Wong*, it should be astute to give effect to that purpose, as the language of the rule suggests. Any anxiety about the dangers involved in that purpose must not be permitted (so long as the rule is valid) to frustrate the achievement of its objective. Such anxiety can only properly be reflected at a later stage in the discretionary orders that are made in the course of the Court's supervision of the commencement and continuation of the proceedings and their enforcement against particular persons who claim exemption from any judgment or order under the rule[210].

161 Thirdly, this approach to the meaning of the "same interest" is, as the Court of Appeal recognised[211], the approach that was explained by this Court in *Carnie*[212] and endorsed in *Wong*[213]. In the latter case, five members of this Court said[214]:

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210 See eg Pt 13 r 8(6).

211 (2005) 63 NSWLR 203 at 238-255 [156]-[255].

212 (1995) 182 CLR 398 at 404 per Mason CJ, Deane and Dawson JJ, 408 per Brennan J, 421 per Toohey and Gaudron JJ, 427 per McHugh J.

> "This rule provided for the commencement of proceedings by numerous persons having 'the same interest in any proceeding'. In *Carnie*, Mason CJ, Deane and Dawson JJ[215] expressed the view that to equate the meaning of the phrase 'same interest' with a common ingredient in the cause of action by each member of the class might not adequately reflect the content of the statutory expression. Their Honours said that the expression may extend 'to a significant common interest in the resolution of any question of law or fact arising in the relevant proceedings'. Brennan J[216] and McHugh J[217] were of opinion that a plaintiff and the represented persons had 'the same interest' when they had a community of interest 'in the determination of any substantial question of law or fact that arises in the proceedings'. Toohey and Gaudron JJ[218] treated as sufficient 'a significant question common to all members of the class' to be determined by the grant of declaratory relief."

162 These explanations of the words the "same interest" stand in sharp contrast to the approach now taken by the reasons of the majority. Here, the "same interest" postulated is that of the named plaintiffs and the other persons "affected", defined as persons who had bought tobacco products from the appellants by transactions of an identical or analogous kind as those made between the respondents and the appellants.

163 Fourthly, it is important to recognise that, in the present case, the proceedings came before the primary judge before the filing of any defences by the appellants. This being so, it was not possible, at that stage, to state with certainty what were the defined issues in the proceedings that any such defences would later identify. This is a further reason why it is erroneous, at such a preliminary stage, to speculate, as the majority do, on the issues that might later exist between other purchasers of tobacco products and the appellants, in advance of such pleadings[219].

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213 (1999) 199 CLR 255 at 260-261 [11].

214 (1999) 199 CLR 255 at 267 [27].

215 (1995) 182 CLR 398 at 404.

216 (1995) 182 CLR 398 at 408.

217 (1995) 182 CLR 398 at 427.

218 (1995) 182 CLR 398 at 421.

219 Reasons of Gummow, Hayne and Crennan JJ at [56]; reasons of Callinan and Heydon JJ at [216]-[226].

164 The fundamental mistake of the reasons of the majority is that they conflate the "interest" of other persons "in those proceedings"[220] with the stated requirement of the sub-rule that envisages that the "same interest" shall precede "any proceedings" and is thus not confined to the way those proceedings are later pleaded. The serious consequence of this approach is that it needlessly restricts the availability of representative proceedings, effectively to a class of persons who had an interest in the proceedings when they were instituted (as distinct from when they are decided)[221]. This restrictive approach destroys much of the utility of the rule as a facility for representative proceedings. Effectively, it prevents such proceedings being mounted to protect persons, standing in a like position but not yet organised, from the descent of a limitation bar. Indeed, it prevents such proceedings being used to gather those with like claims into a suitable procedure for the enforcement of their "concurrent interests"[222] and who decide to opt in to the proceedings. Especially against the background of the facultative approach that this Court has taken in *Carnie* and *Wong* (and the recognition in the reasons of Gummow, Hayne and Crennan JJ of the affirmative basis for facilitating proceedings of such a character[223]) the approach now taken by the majority should be rejected. It is not what the rule says. Nor is it what it has been held to say. Nor what it was intended to permit.

165 Fifthly, the provisions elsewhere in Pt 8 r 13 of the Rules reinforce the approach to the meaning of sub-r (1) that I, alike with Gleeson CJ, favour. The terms of sub-rr (4), (5) and (6) obviously contemplate procedures by which others, amongst the "numerous persons" contemplated by sub-r (1), may "opt in" to the representative action *after* the proceedings have been commenced. Of necessity, the "interests" of such persons will not have been defined at the time the "proceedings" were "commenced" in terms of the pleadings of such "proceedings". This serves to confirm that the "same interest" being spoken of in Pt 8 r 13(1) is an interest of a generic, not of a pleading, kind.

166 In the present case, the generic identity of interest was more than adequately established by reference to the class of retailers who had bought tobacco products from the appellants and who, like Fostif, had paid the appellants the unremitted invalid tax at the time defined by the delivery of this Court's decision in *Ha*. For the purpose of the sub-rule, and given its object, that was a sufficient specification of the "same interest". Clearly, it preceded the commencement of the proceedings. The proceedings then commenced, were

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220 Reasons of Gummow, Hayne and Crennan JJ at [51]-[58].

221 Reasons of Gummow, Hayne and Crennan JJ at [58].

222 "Representation: concurrent interests" is the heading to Pt 8 r 13.

223 Reasons of Gummow, Hayne and Crennan JJ at [88]-[96].

subject to subsequent judicial supervision. Without such supervision, they could not be continued. Specifically, they were subject to protection against the enforcement of any judgment or order where it was shown that "by reason of facts and matters particular to his case" a party was entitled to be exempted from liability[224]. This is the way that Pt 8 r 13 envisages that the individualities and peculiarities of particular transactions will be adjusted at the *discretionary* stage. It is not by denying the commencement of a representative action applicable to such cases at the *jurisdictional* stage.

167 Sixthly, so far as there is any suggestion that the approach adopted in the reasons of the majority is warranted because no common beneficial relief is sought[225], in the form of judgment claimed by Fostif in its pleading, this too involves the adoption of an approach unacceptably hostile to the purposes of representative proceedings. It is one particularly inappropriate at the stage that these proceedings have so far reached.

168 The notion that "common beneficial relief" is a necessary precursor to the proper invocation of Pt 8 r 13, as suggested by the majority[226], is erroneous. In fact, Callinan and Heydon JJ describe the "declaration" sought in *Carnie* as the "crucial" factor in the outcome of that case, allowing the two plaintiffs existing at the time the proceedings were commenced to properly claim "on behalf of themselves and all other persons"[227]. As Gleeson CJ sets out[228], a declaration was sought in *Carnie* because of the particular facts existing in that case. Indeed, in *Carnie*, a declaration was the only relief capable of being sought that would not have had the potential to harm the financial interests of likely plaintiffs. That problem is not present in this case[229]. Given that this Court accepts that parties need not have *precisely* the same cause of action to establish the "same interest" for the purposes of representative proceedings, it is difficult to comprehend how a specific claim for relief is determinative of whether or not there is a commonality of interests.

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224 Pt 8 r 13(6).

225 Reasons of Gummow, Hayne and Crennan JJ at [55]-[59].

226 Reasons of Gummow, Hayne and Crennan JJ at [58]; reasons of Callinan and Heydon JJ at [216], [221]-[226].

227 Reasons of Callinan and Heydon JJ at [225].

228 Reasons of Gleeson CJ at [7]-[11].

229 Reasons of Gleeson CJ at [11].

169 The "same interest" of which Pt 8 r 13(1) speaks is addressed to the issues existing before the proceedings are commenced. It is not addressed to the relief ultimately sought. When the defences are filed to the present proceedings, it would be open to the respondents to cure any supposed defect in their pleading by the amendment of the summons to include a claim for a declaration. A facultative approach to Pt 13 r 8(1) would permit the proceedings to continue, subject to such an amendment being made. In my view, that is a course that should be left, as the Court of Appeal envisaged, to the judge in the Commercial List to whom the proceedings were returned by that Court's order. It is not a reason for this Court to deny the continuance of the representative proceedings to secure the vindication of the "same interest" of the retailers who purchased their tobacco products from the appellants where so many other retailers with the "same interest" have already had their entitlements vindicated by the commencement of other, similar, proceedings.

170 Following this Court's decision in *Roxborough* and the predictably high degree of similarity in the dealings between tobacco wholesalers and retailers for the recovery of like unlawful taxes, it flies in the face of reality to deny the appellants' retailers, virtually alone, the opportunity to elect to "opt in" to the representative proceedings begun by the respondents with the similarity of their interests in mind. To the extent that, on closer examination and at a later stage, the interests proved not relevantly to be "the same" (a most unlikely conjecture in this case) adequate judicial means exist under Pt 8 r 13 of the Rules to permit judicial protection both of those interests and of the interests of the appellants. That would be the time for the appellants to agitate any alleged dissimilarity of interests. It is not necessary for a party, at the time of initiating a representative action, to vindicate such "interests" that may eventually be demonstrated to be "the same". The contrary view is incompatible with the language of the rule, the past authority of this Court, and with the achievement of the rule's purpose.

171 *Conclusion: the rule applies*: I would therefore reject the suggestion that Pt 8 r 13(1) of the Rules was not applicable to the present proceedings. Specifically, I disagree with the contention that, at the time the proceedings were instituted and when the primary judge made his orders, there were not "numerous persons having the same interest in the proceedings". To say that only the respondents personally had an interest in the proceedings is to ignore the very purpose of such proceedings, the way they were expressed and the intended operation of the Rules designed to permit just such representative actions to be brought on behalf of persons later organised into the proceedings by the "opt-in" procedure proposed by the respondents[230].

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230 cf reasons of Gummow, Hayne and Crennan JJ at [58]-[60].

172 I agree with Gleeson CJ[231] that the approach of the majority in this Court is inconsistent with the holding of this Court in *Carnie*. The approach of the majority ignores the obvious application of that decision and its demand that the decision-maker determine whether Pt 8 r 13(1) has been correctly invoked. In relation to this case, that inquiry asks[232]:

> "Do numerous persons have the same interest in the action which [Fostif] have commenced? If they do not then that is the end of the matter. If they do, then the action is properly begun and, unless the Court otherwise orders, it may be continued."

173 It is clear that there were numerous persons with the "same interest"[233] in the action commenced by Fostif on 30 June 2003. It must be remembered that in *Carnie*, this Court held that the onus was not on the plaintiffs to "identify every member of the class; rather it [was] to identify the class with sufficient particularity"[234]. This was clearly achieved by Fostif in the summonses to commence these proceedings, filed in June 2003. On any reading it is obvious that Pt 8 r 13(1) was properly invoked; the summonses described a class of "numerous other persons capable of being clearly defined who have the same interest in these proceedings"[235]. Thus, the possible existence of numerous parties and the requisite commonality of interest between them was satisfied.[236] This conclusion is reinforced by the fact that Firmstones was subsequently retained by around 2,100 persons or entities that "fell within the class of represented retailers" as defined in the representative proceedings[237]. Yet, in the reasons of Gummow, Hayne and Crennan JJ[238], it is argued that it was not

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231 See reasons of Gleeson CJ at [2], [9]-[13].

232 (1995) 182 CLR 398 at 421 per Toohey and Gaudron JJ (Mason CJ, Deane and Dawson JJ concurring).

233 As defined in *Carnie* (1995) 182 CLR 398 at 404-405 per Mason CJ, Deane and Dawson JJ, 408 per Brennan J, 421, 424 per Toohey and Gaudron JJ, 427 per McHugh J and discussed above in these reasons at [161].

234 (1995) 182 CLR 398 at 422 per Toohey and Gaudron JJ.

235 (1995) 182 CLR 398 at 424 per Toohey and Gaudron JJ.

236 (1995) 182 CLR 398 at 405 per Mason CJ, Deane and Dawson JJ, 424 per Toohey and Gaudron JJ.

237 Reasons of Gummow, Hayne and Crennan JJ at [35].

238 See also the reasons of Callinan and Heydon JJ at [215], [222]-[223].

apparent from the proceedings, as commenced, that there was "*any* person, let alone numerous persons, whom the plaintiff would represent"[239]. That appears the very point upon which they decide these appeals in the appellants' favour[240]. I can only say that I am wholly unconvinced.

174 In so far as the appellants repeated in this Court their earlier separate and different grounds for contesting the existence of the "same interest" of "numerous persons" in the proceedings, I would reject those arguments for the reasons given by the Court of Appeal. Those reasons are encapsulated in that Court's conclusion that the present respondents had demonstrated that the rule was engaged on the footing that there were "substantial common issues of *law* linking the claims of each represented group of retailers" and that "the scope and applicability of *Roxborough* [constituted] a genuine issue in each proceeding"[241]. This conclusion was fully supported by reference to the terms of the summonses, to the written submissions filed before the primary judge and indeed to the submissions made by the appellants themselves in the courts below[242].

175 Moreover, the Court of Appeal found there were also common issues of *fact* likely to arise within each proceeding. Their existence reinforced the conclusion that the precondition to the commencement of the representative action as brought, was established[243]:

> "There is a single defendant named in each proceeding. The evidence discloses that within the relevant period its invoicing practices were either identical in all its dealings or contained variations about which the [plaintiffs] say with arguable justification there is no material distinction. At the very least, it is established at this stage that, within each separate proceeding, there are material common issues of fact (invoicing, warehousing, methods of calculating and passing on the licence fee by the wholesaler) that establish a sufficient community of interest to satisfy the Rule's jurisdictional requirement and indicate the appropriateness of the proceeding continuing as a unity pursuant to the Rule, at least for the time being."

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239 Reasons of Gummow, Hayne and Crennan JJ at [59]. (original emphasis)

240 Reasons of Gummow, Hayne and Crennan JJ at [58]-[60].

241 (2005) 63 NSWLR 203 at 247 [212]. (emphasis added)

242 (2005) 63 NSWLR 203 at 247-255 [213]-[255].

243 (2005) 63 NSWLR 203 at 255 [256].

176 The commonality of the parties and the identified issues of law and fact are established. It follows that no error has been shown in the understanding of the meaning of the rule or in its application that would warrant the intervention of this Court or its substitution of a different conclusion. On the second issue too the appellants fail.

The approach to discovery was correct

177 *Disclosure of identities*: The third issue was correctly perceived by the Court of Appeal to be whether, on the basis that the representative proceedings should not be stayed and were validly commenced, discovery and interrogatories as claimed by the respondents should be refused *in limine*[244].

178 The discovery orders requested by the respondent (and the interrogatories that they sought to have the appellants answer[245]) aimed at obliging the appellants to disclose the records of their transactions affecting "represented retailers", as defined in the respective summonses. The respondents sought to engage these procedures in aid of the prosecution of the proceedings as representative proceedings. The primary judge declined to make such orders. He did so because of his conclusions that the proceedings did not properly engage the rule for the commencement of representative proceedings or, if they did, that they should be stayed permanently as an abuse of process. Nevertheless, he indicated that he saw no objection, in principle, to the grant of such relief, although it was sought for the purpose of ascertaining the members of the class[246]. He accepted that discovery to identify potential parties was a remedy with a sound legal basis[247].

179 *Objections to such orders*: In this Court, the appellants maintained their objections to the provision of such relief. By hypothesis, it is necessary to consider their objections upon the assumption that the appellants' primary attack on the validity of the proceedings, as representative proceedings, has failed. This is so, because, were that attack to succeed, the ancillary questions would not arise for immediate determination.

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244 (2005) 63 NSWLR 203 at 260-261 [290].

245 Respectively under Pts 23 r 3 and 24 r 5 of the Rules. See (2005) 63 NSWLR 203 at 256 [260]-[261].

246 *Keelhall* (2003) 54 ATR 75 at 119-120 [152]-[153].

247 *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1 at 9-10 [24]-[26] per Wilcox, Sackville and Katz JJ. See *Fostif* (2005) 63 NSWLR 203 at 257 [264].

180 The appellants submitted that the discovery of the identity of persons whom the plaintiffs hoped to include as "represented retailers" did not relate to any matter or fact in issue in the proceedings as initially constituted; would impermissibly impose on the appellants an obligation to identify persons entitled to judgment against themselves; would involve the Court in facilitating a champertous project; and would be oppressive of the appellants solely for the purpose of furthering the financial benefit of Firmstones, which was not a party to the proceedings.

181 *The arguments rejected*: None of these arguments is persuasive. Identity discovery has a long history. The rules invoked by the respondent are broad enough, viewed with their overriding purpose in mind, to permit the making of the orders sought. Such orders would facilitate access to the determination of their legal entitlements of those who, being identified, subsequently elected to "opt in" to the representative proceedings on the terms proposed[248]. As has been recognised in the United States, the propriety and viability of a representative type action cannot, in some cases, be determined without discovery "as for example, where discovery is necessary to determine the existence of a class or set of sub-classes". In such cases it has been held that "[t]o deny discovery … would be an abuse of discretion"[249].

182 Once the initiation and continuance of the proceedings as representative proceedings is postulated (as it must be for this purpose) the relief sought by the respondents is no more than an appropriate invocation of the rules, designed to ensure that the proceedings, so commenced, are successfully and fairly brought to trial.

183 The appellants' claim of oppression is as unconvincing to me as it was in the courts below. It is hard to reconcile that claim with the contention, upon which the appellants relied for other purposes, that at the time of the hearing before the primary judge approximately 95 per cent of the potentially "represented retailers" remained customers of the appellants. In these circumstances, it is unsurprising that Mason P should have been "unpersuaded that the exercise is so oppressive that discovery should be refused outright with respect to such obviously pertinent information some of which is undoubtedly reasonably accessible"[250].

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248 cf *Oppenheimer Fund Inc v Sanders* 437 US 340 at 350-356 (1978) per Powell J (delivering the unanimous opinion of the Court).

249 *Kamm v California City Development Co* 509 F 2d 205 at 210 (1975).

250 (2005) 63 NSWLR 203 at 260 [289].

184 *The correct disposition*: The Court of Appeal concluded that the real problem presented by "the discovery dispute" was one of prematurity[251]. That Court's opinion was that it should be left to a judge in the Division of the Supreme Court where the trial of the proceedings would occur, to determine contested questions of discovery and interrogatories. Mason P recognised the assertion of the appellants, in their defence, that some (or all) of their retailers might fall into a class of persons who paid the amount of the tobacco licence fee referable to sales but without any "separately identifiable and serviceable parts of the consideration payable in respect of each sale" attributed to such fees. It was Mason P's view that "this is a matter to be explored in the litigation"[252]. I agree with that conclusion[253].

185 *Conclusion: orders correct*: It follows that I would reject the appellants' submission that discovery and interrogatories were unavailable to the respondents, as a matter of legal principle. The fashioning and implementation of such remedies was properly remitted to a single judge. That is where such procedural questions are normally decided, once it is concluded that the remedies are available as a matter of law.

186 No error has been shown in the Court of Appeal's treatment of the third issue. The appellants' submissions on this matter likewise fail.

The constitutional objection also fails

187 *Supposed absence of a "matter"*: By an amended ground of appeal, the appellants raised a constitutional issue that had not been agitated before the primary judge or the Court of Appeal. Notwithstanding this omission, the respondents did not suggest that the point was unavailable to the appellants, in this Court, either for legal[254] or procedural[255] reasons. In these circumstances, this Court must decide the issue. It cannot be ignored, given that it is presented as a fundamental legal defect in representative proceedings of the kind postulated by the respondents.

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251 (2005) 63 NSWLR 203 at 258 [273].

252 (2005) 63 NSWLR 203 at 261 [290].

253 See also the reasons of Gleeson CJ at [14]-[15].

254 *Gipp v The Queen* (1998) 194 CLR 106 at 116 [23]-[24] per Gaudron J, 169 [185] per Callinan J, 145-147 [117]-[119] of my reasons; *Crampton v The Queen* (2000) 206 CLR 161.

255 *Coulton v Holcombe* (1986) 162 CLR 1 at 7-9 per Gibbs CJ, Wilson, Brennan and Dawson JJ; cf my observations in *Roberts v Bass* (2002) 212 CLR 1 at 54 [143].

188 Essential to the appellants' argument of constitutional invalidity is the suggestion that the proceedings are within federal jurisdiction and that, therefore, they must, so far as invested in any court of a State, involve a "matter" in the constitutional sense of that word[256]. In *Fencott v Muller*[257], this Court explained:

> "[T]he unique and essential function of the judicial power is the quelling of such controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion."

189 The appellants argued that, on various grounds, the representative proceedings which the respondents sought to bring to trial offended this basal notion of the character and purpose of federal judicial power. Thus, the appellants submitted that, far from quelling existing controversies, the respondents were seeking to create controversies that otherwise did not exist[258]. They were stirring up controversies and enlisting courts in the exercise of federal jurisdiction, in their attempt to do so. They were endeavouring, without identifying those affected in advance, to obtain suspension of relevant limitation periods in respect of still unidentified persons. Moreover, they were doing this to make a personal profit for a third party who was an "alien to such future controversies", namely the funder, Firmstones. The appellants said that this was contrary to the fundamental assumptions of Ch III of the Constitution and was therefore constitutionally impermissible.

190 Alternatively, the appellants argued that the representative proceedings envisaged by the respondents amounted to the furtherance of an abuse of the judicial power of the Commonwealth which was constitutionally forbidden. In support of this way of presenting their argument, the appellants invoked observations made by members of this Court in *Nicholas v The Queen*[259]. They submitted that, for matters within federal jurisdiction, abuse of power (or process) had a constitutional foundation, resting on the implications necessary to

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256 Constitution, s 77(iii).

257 (1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ.

258 cf *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 458-459 [242] per Hayne J; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355 [45] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 523-525 [24]-[25] per Gleeson CJ and McHugh J, 570-571 [165] per Gummow and Hayne JJ.

259 (1998) 193 CLR 173 at 208-209 [74] per Gaudron J, 226 [126] per McHugh J, 265 [213] of my reasons.

the Constitution as to how the judicial power would be deployed[260]. These arguments repeated the contention that the respondents' proceedings amounted to an abuse of process, but this time with a constitutional dimension.

191 *Federal jurisdiction*: I will assume that, in the proceedings, the Supreme Court of New South Wales was exercising federal jurisdiction. Whether that was so can sometimes be a matter of dispute and oversight[261]. On the approach that I favoured in *Roxborough*[262], the entitlements of retailers such as the respondents to recover payments made on a tax invalidated by the Constitution was to be found as an implication of the Constitution itself. Hence it was necessarily a "matter" within federal jurisdiction. As stated in *Roxborough*, that view was rejected by the majority of this Court. The majority treated the claim for recovery as one based on private rights of action, founded in the common law or equity.

192 Nevertheless, because the source of those private rights may ultimately be traced to a constitutional provision, I am prepared to accept that their enforcement is a matter "arising under the Constitution, or involving its interpretation"[263]. I can accept this conclusion more readily because of my own opinion as to the true character of the recovery action.

193 Because, therefore, the proceedings in the Supreme Court of New South Wales were in federal jurisdiction, vested in that Court pursuant to the Constitution, it was necessary for any State law (or the common law) applicable to the proceedings to be consistent with federal law, most especially with the Constitution itself. Otherwise, such State law would not be "picked up" and applied in federal jurisdiction pursuant to the *Judiciary Act* 1903 (Cth)[264]. Specifically, if Pt 8 r 13 of the Rules involved procedures that were inconsistent

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260 They referred by analogy to cases on contempt of court: *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 395-397 [16]-[25] per Gleeson CJ and Gummow J, 403 [47] per McHugh J; and on judicial impartiality: *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 362-363 [80]-[81] per Gaudron J, 373 [116] of my reasons.

261 As in *British American Tobacco* (2003) 217 CLR 30 at 41-42 [5] per Gleeson CJ, 50-51 [36] per McHugh, Gummow and Hayne JJ, 67 [92] of my reasons.

262 (2001) 208 CLR 516 at 559 [111], 579-580 [174].

263 *Judiciary Act* 1903 (Cth), s 39. See *British American Tobacco* (2003) 217 CLR 30 at 51 [37] per McHugh, Gummow and Hayne JJ.

264 ss 79, 80.

with the Constitution, it could not have any application to the exercise of federal jurisdiction[265].

194 *A "matter" exists*: The appellants' constitutional arguments should be rejected. It is true that the meaning of the word "matter" in the Constitution[266] and in the *Judiciary Act*[267] is somewhat elusive[268]. However, I remain of the view that "[i]t is undesirable that the word should be subjected to excessive refinement or submitted to inappropriate elaboration leading to unnecessary constitutional rigidity"[269].

195 The appellants' first argument, repeated by Mobil in the connected proceedings, bears a close similarity to the argument advanced by Mobil, and rejected by this Court in *Mobil Oil Australia Pty Ltd v Victoria*[270]. As recorded, the argument advanced by Mobil in that appeal was that[271]:

> "… parties who, having no consciousness of the controversy, are not involved in it. It therefore trespasses beyond the framework of a genuine justiciable controversy."

This was another way of saying that it could not amount to a "matter" for constitutional purposes.

196 In rejecting this argument, Gleeson CJ[272] pointed out that[273]:

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265 See my reasons in *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 163 [119]-[120].

266 Constitution, ss 75, 76, 77 and 78.

267 s 38.

268 See my reasons in *Abebe v The Commonwealth* (1999) 197 CLR 510 at 585 [215].

269 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 650 [156]. See also at 669 [209]-[210] per Callinan J.

270 (2002) 211 CLR 1.

271 (2002) 211 CLR 1 at 7.

272 (2002) 211 CLR 1 at 27 [22].

273 cf the arguments raised in *In re Freme's Contract* [1895] 2 Ch 778 at 780-781.

> "It is not unknown for judicial decisions to determine the rights of people who were unaware of their existence, or even of people who were unborn at the time of the decision."

197 In their reasons, Gaudron, Gummow and Hayne JJ said of the Victorian provisions, permitting the "group proceedings" in issue in the earlier case[274]:

> "Although a proceeding under Pt 4A may affect the rights both of those who know of and support the prosecution of the proceeding and of those who do not know of it, Pt 4A does not compel the unwilling to continue to remain a group member. The unwilling may seek to opt out. Further, in affecting the rights of those who know of the proceeding and those who do not, a proceeding under Pt 4A is no different from representative proceedings of a kind common in the State Supreme Courts since federation and in their colonial predecessors."

198 In my reasons, I observed[275]:

> "… [D]ealing with representative claims, and doing so by adjudicating the rights of all who are in a class of persons, has long been a feature of the ordinary practice of courts. The order that results from representative proceedings of the traditional kind, and the order that results from proceedings of the kind for which Pt 4A provides will, absent some order to the contrary, finally bind all those in the class concerned, regardless of their particular state of knowledge of the proceeding. It is a judgment made in the exercise of judicial power."

199 The appellants' argument assumed that there could be no "matter" because there was no controversy until a legal proceeding had been instituted or formulated by the person seeking recovery. This view of the constitutional word was rejected by the Federal Court in *Hooper v Kirella Pty Ltd*[276] for reasons that I would endorse. The basic flaw in the appellants' argument is that it fails to take into account the fact that this Court, since its decision in *In re Judiciary and Navigation Acts*[277], has distinguished between a "matter" and the legal proceeding

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274 (2002) 211 CLR 1 at 34-35 [51] referring to Pt 4A of the *Supreme Court Act* 1986 (Vic).

275 (2002) 211 CLR 1 at 39 [65].

276 (1999) 96 FCR 1 at 13-16 [45]-[55] per Wilcox, Sackville and Katz JJ.

277 (1921) 29 CLR 257 at 265-266 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ. See also *Abebe v The Commonwealth* (1999) 197 CLR 510 at 523-525 [24]-[25] per Gleeson CJ and McHugh J, 555 [117] per Gaudron J, 570-571 [164]-[167] per Gummow and Hayne JJ, 588 [225] of my reasons.

in which the "matter" might be determined. A "matter" connotes a controversy "which might come before a Court of Justice"[278]. It is "identifiable independently of the proceedings which are brought for its determination"[279]. Thus a "matter" exists where there is a legal claim, "even though a right, duty or liability has not been established and, indeed, may never be established"[280].

200 In the present appeals, if individual retailers are aggrieved by reason of a legal obligation to pay unremitted moneys to the wholesaler on a constitutionally invalid tax and the wholesaler fails to refund that payment, there is a qualifying controversy. Hence there is a "matter". The retailers are aggrieved that the wholesaler has benefited from a legal windfall at their expense. The mere fact that, unless organised into representative proceedings, the retailers might not have the ready means to translate their grievance into legal proceedings to resolve the controversy does not alter the constitutional character of that grievance. It remains a "matter". The fact that the litigation funder, Firmstones, may have its own separate and additional interest in the retailers' grievance is also irrelevant to the constitutional character of that grievance in the first place.

201 Given that representative proceedings of various kinds preceded federation in Australia, it would be a very surprising outcome now to conclude, on a quasi-theological elaboration of the word "matter", that federal jurisdiction did not permit such proceedings to be brought. That conclusion would be specially surprising, in a representative proceeding of the "opt-in" variety, which is what the respondents propose in these proceedings. It would be remarkable given that there is no hint of a constitutional defect in the treatment of such proceedings by this Court in *Wong*, a case clearly in federal jurisdiction. Moreover, the existence of a constitutional problem was rejected by members of the Court in the earlier *Mobil Oil* case. It would be nothing short of astonishing if the federal jurisdiction for which Ch III of the Constitution provides were to be so constrained as to forbid such proceedings, given the broad national purposes for which that jurisdiction was provided by the Constitution and the potential utility of such proceedings in an age when mass production of goods and services

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278 *The State of South Australia v The State of Victoria* (1911) 12 CLR 667 at 675 per Griffith CJ.

279 *Fencott v Muller* (1983) 152 CLR 570 at 603 per Mason, Murphy, Brennan and Deane JJ.

280 *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1 at 15 [55] per Wilcox, Sackville and Katz JJ.

has a tendency to produce multiple claims of an identical or analogous character[281]. We should always remember[282]:

> "[The Constitution] … is the governmental charter of today's Australians. It belongs to the present and the future. It is not chained to the past[283]. It should be construed, so far as its text and structure permit, to avoid irrational rigidities or seriously inconvenient outcomes. Ordinarily, such rigidities and serious inconvenience will be inconsistent with the enduring character of the Constitution as the charter of government of a modern nation."

202 By "organising" persons into a legal action for the vindication of their legal rights, representative proceedings are not creating controversies that did not exist. Controversies pre-existed the proceedings, even if all those involved in them were unaware of, or unwilling earlier to pursue, their rights. A litigation funder, such as Firmstones, does not invent the rights. It merely organises those asserting such rights so that they can secure access to a court of justice that will rule on their entitlements one way or the other, according to law.

203 The appellants' first constitutional argument, that such proceedings are incompatible with the requirements of federal jurisdiction, fails.

204 *No constitutional abuse*: The appellants' second constitutional argument seeks either to derive from the language of Ch III of the Constitution a doctrine of abuse of process that is constitutional in character or to subject the pre-existing common law doctrine on that subject to a constitutional imperative so as to be consistent with the assumptions of Ch III.

205 Whilst I accept that the full ambit of the implications necessary to the operation of the Judicature for which Ch III provides has not yet been explored[284]

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281 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46, (1988) at 8-11 [13]-[20].

282 As I observed in *Abebe v The Commonwealth* (1999) 197 CLR 510 at 582 [203].

283 *Victoria v The Commonwealth* (1971) 122 CLR 353 at 396 per Windeyer J; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 171-173 per Deane J.

284 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 617-618 [154]. See also McHugh, "Does Chapter III of the Constitution protect substantive as well as procedural rights?", (2001) 21 *Australian Bar Review* 235; Lacey, "Inherent Jurisdiction, Judicial Power and Implied Guarantees under Ch III of the Constitution", (2003) 31 *Federal Law Review* 57.

(as may be seen in the many cases that have invoked the "*Kable* doctrine"[285] since it was first explained), I am unconvinced that it is necessary or useful to constitutionalise remedies for abuse of process. Long before the Constitution was written, common law courts in England and in the Australian colonies provided remedies against abuse of a court's processes. Such remedies are flexible. They adapt to new times and new circumstances[286]. Moreover, in particular cases, by particular statutory language, Parliaments can sometimes state where the balance of public interest lies[287].

206 In these circumstances, no convincing necessity has been shown as to why remedies against abuse of process must be given a constitutional status, to repel representative or like proceedings. I accept that such proceedings, including when organised by litigation funders concerned with their own profits, may involve risks of abuse of judicial process[288]. The need for protection of the vulnerable was mentioned by Gleeson CJ in the New South Wales Court of Appeal in *Carnie*[289]. It was also recognised by that Court in these proceedings[290]. However, it has not been demonstrated that the judicial supervision envisaged by the Court of Appeal's orders would be inadequate to prevent abuse of process or injustice in the proceedings initiated by the respondents.

207 This Court was informed by the Attorney-General of the Commonwealth (intervening on the constitutional issue in support of the respondents) that the Standing Committee of Attorneys-General is presently considering the issue of litigation funding[291]. Further legislative regulation may emerge from that consideration. Alternatively, more elaborate provisions in the Rules may be

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285 Following *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

286 See *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 80 ALJR 1100; 227 ALR 425.

287 *Nicholas v The Queen* (1998) 193 CLR 173 at 197-198 [37]-[38] per Brennan CJ.

288 Beisner, Shors and Miller, "Class Action 'Cops': Public Servants or Private Entrepreneurs?", (2005) 57 *Stanford Law Review* 1441.

289 *Esanda Finance Corp Ltd v Carnie* (1992) 29 NSWLR 382 at 388. See above these reasons at [132]-[133].

290 (2005) 63 NSWLR 203 at 258-259 [279].

291 North, "Litigation Funding: Much to be Achieved With the Right Approach" (2005) 43(11) *Law Society Journal (NSW)* 66 at 68-69; cf Aitken, "'Litigation Lending' after *Fostif*: An Advance in Consumer Protection, or a Licence to 'Bottomfeeders'?", (2006) 28 *Sydney Law Review* 171 at 179.

necessary in those jurisdictions that have persisted with abbreviated rules, such as those found in Pt 8 r 13 of the Rules in this case[292]. It has not been demonstrated that it is necessary to stamp on this new practice the rigidities of constitutional norms.

208 Accepting that the common law rules on abuse of process must conform to any applicable constitutional assumptions[293], it does not follow that a constitutional requirement, more restrictive of representative proceedings, demands modification of previous understandings of the common law rules on abuse of process.

209 In the light of recent decisions, it cannot be said that the common law test of abuse of process compromises in any way the institutional integrity of the Supreme Court, as a repository of federal jurisdiction[294]. The capacity of the principles of abuse of process to respond to what was seen as the infliction of injustice on defendants in a particular case was demonstrated recently in *Batistatos v Roads and Traffic Authority of New South Wales*[295]. Although I dissented from the result in that appeal, I fully accepted the availability of the common law remedy, expressed as it was in broad terms[296]. The appellants have not shown any defect in the common law rule on abuse of process, or abuse of jurisdiction, that suggests a need to re-express that law according to more stringent Australian constitutional standards.

210 *Conclusion: no impediment*: It follows that the two arguments that the appellants advanced, on constitutional grounds, to challenge the applicability to federal jurisdiction of Pt 8 r 13 of the Supreme Court Rules (NSW), fail. There is no constitutional defect in those proceedings. Nor is there any need to formulate a new constitutional rule on abuse of process to invalidate the

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292 See (2005) 63 NSWLR 203 at 258 [278] contrasting *Federal Court of Australia Act* 1976 (Cth), Pt 1VA.

293 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 533-535 [63]-[70] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; my reasons in *Roberts v Bass* (2002) 212 CLR 1 at 54-55 [143]-[144].

294 cf *Fardon v Attorney-General (Q)* (2004) 78 ALJR 1519 at 1527-1528 [35] per McHugh J, 1539 [101], 1541-1542 [117] per Gummow J, 1564 [234] per Callinan and Heydon JJ; 210 ALR 50 at 62, 78, 81, 113.

295 (2006) 80 ALJR 1100 at 1141-1142 [223]; 227 ALR 425 at 475-476.

296 See also my reasons in *Island Maritime Ltd v Filipowski* (2006) 80 ALJR 1168 at 1188-1189 [97].

respondents' proceedings or the interest in them of the litigation funder, Firmstones.

Orders

211 All of the challenges mounted by the appellants against the respondents' proceedings have therefore failed. Accordingly, all of the appeals should be dismissed with costs.

212 CALLINAN AND HEYDON JJ. The circumstances are set out in the reasons for judgment of Gummow, Hayne and Crennan JJ.

Part 8 r 13 of the Supreme Court Rules (NSW)

213 There were two key conditions in Pt 8 r 13(1) which the plaintiffs had to satisfy for the proceedings to be commenced as representative proceedings.

214 First, it was not enough that "numerous persons" had "the same interest" in the abstract – they had to have the same interest *in the proceedings*. To use words employed by Toohey and Gaudron JJ (with whom Mason CJ, Deane and Dawson JJ concurred) in *Carnie v Esanda Finance Corporation Ltd*, it had to be the case that there was "a significant question common to all members of the class and they stand to be equally affected by the declaratory relief which the [plaintiffs] seek"[297]. Similarly, to use words employed by Lord Macnaghten[298] and approvingly quoted by Toohey and Gaudron JJ in *Carnie v Esanda Finance Corporation Ltd*, the action lay "if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent"[299].

215 The second condition was that "the same interest" must actually have existed when the proceedings began. It was not enough that it might exist at some future time.

216 Both these conditions were satisfied in *Carnie v Esanda Finance Corporation Ltd*[300]. However, that case is distinguishable from the present one. In that case par 6 of the statement of claim alleged that the plaintiffs had brought proceedings on behalf of themselves and all other persons ("the represented debtors") who had entered certain described contracts. The relief claimed included a declaration that no represented debtor was required to pay any amount on account of credit charges in relation to contracts answering the description in par 6[301]. Because of the claim for a declaration so framed, the allegation in par 6

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297 (1995) 182 CLR 398 at 421; see also at 424.

298 *Duke of Bedford v Ellis* [1901] AC 1 at 8.

299 (1995) 182 CLR 398 at 416.

300 (1995) 182 CLR 398.

301 Four declarations were sought, two of which in terms related to the represented debtors: these two mirrored the language of two declarations relating to the plaintiffs. The declarations were claimed in sub-pars (1), (1A), (1B) and (2) of the claims to relief, which are set out in Gleeson CJ's reasons for judgment in the Court

(Footnote continues on next page)

that the plaintiffs were bringing the proceedings on behalf of themselves and the represented debtors was in one sense true, even though the plaintiffs had no instructions from the represented debtors.

217 There are words in the summonses which initiated the proceedings under consideration in the present appeals corresponding with the allegation in par 6 of the statement of claim of *Carnie v Esanda Finance Corporation Ltd*. However, they are not capable of bringing about the same result in this case.

218 In the proceedings in which Fostif Pty Limited is the only plaintiff, par 1 of Section A of the summons begins: "The plaintiff claims the relief set out in this Summons on behalf of themselves [scil 'itself'] and the class of unnamed persons referred to in paragraph 2" of Section B of the summons. What is that relief? Apart from costs, the only specific order claimed is "Judgment against the defendant in favour of the plaintiff together with interest pursuant to section 94 of the Supreme Court Act (NSW)." What would that judgment be for? The answer is: a sum of money calculated by reference to the allegations in pars 12-20 of Section C of the summons. Paragraphs 19-20 of Section C of the summons allege:

> "19. The plaintiff*s* are entitled to be paid the amounts referred to in paragraph 15 above.
>
> 20. The plaintiff*s* are entitled to be paid interest pursuant to section 94 of the Supreme Court Act (NSW) or otherwise."

Paragraph 15 alleges:

> "The plaintiff*s* paid to the defendant the total amount of the licence fee identified or included in the invoices to the plaintiff*s*."

That in turn is a reference to pars 12 and 13. Those paragraphs allege:

> "12. During the Relevant Period the defendant sold, in the course of tobacco wholesaling, tobacco products to one or more of the plaintiffs.
>
> 13. The said sales of tobacco products were made pursuant to written invoices issued by the defendant which invoices identified in relation to each sale the total value of tobacco products sold."

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of Appeal: *Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382 at 386.

The emphasis given to the plurals appearing in those three quotations has been added.

219 This is an embarrassing and vexatious pleading in view of the fact that there is only one plaintiff – Fostif Pty Limited. The early parts of the summons draw a clear distinction between Fostif Pty Limited as the only plaintiff, and the "class of unnamed persons" on behalf of whom that plaintiff claims to be acting, the members of which were only to "become involved as plaintiff" if they signed and returned the "opt-in notices" described in par 2 of Section A of the summons[302].

220 In the summons the pleader refers sometimes to the "plaintiff" and sometimes to the "plaintiffs". Are these plural forms only clerical errors, or are they something more? In some parts they appear to be only clerical errors, perhaps to be accounted for by the fact that the seven summonses in the proceedings under consideration are in standard form, and in some of the proceedings there is one plaintiff and in some more than one. In other parts, like pars 12-20 of Section C, the part of the summons which is supposed to contain the allegations of material fact, the plural forms may be intentional. Whether intentional or not, pars 12, 13, 15, 19 and 20 of Section C suggest that in fact the "class of unnamed persons" have already become plaintiffs, when that is not the case. Once members of a "class of unnamed persons" become plaintiffs, then the language of pars 12, 13, 15, 19 and 20 is capable of applying appropriately to them. But until such time as members of the "class of unnamed persons" have become plaintiffs, the references to "plaintiffs" in those paragraphs can only be read as references to the single existing plaintiff, namely Fostif Pty Limited.

221 It follows that at the time when the summons was filed and served – which was the crucial time for assessment of whether "numerous persons have the same interest in [the] proceedings" – what the plaintiff, Fostif Pty Limited, was claiming was simply a sum of money to be calculated by reference to its pleaded dealings with the defendant. That sum of money is entirely different from other

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302 A change of plan took place after the proceedings were instituted. By notices of motion returnable on 5 September 2003, the plaintiffs sought discovery of documents identifying "the class of unnamed persons" with a view to inviting them to "opt-in". The notices of motion also sought an order that the proceedings continue as representative proceedings in respect of those members of the class who opted-in, but did not seek an order that they become plaintiffs. The proposed opt-in notice was amended accordingly in the proceedings before Einstein J. But the question whether Pt 8 r 13 is satisfied must be decided as from the time when the proceedings commenced.

sums of money to which other retailers, who were not plaintiffs at that time, might be entitled by reason of their unpleaded dealings with the defendant.

222 Hence it was not true to say, when the summons was filed and served, that in claiming the sum of money to which it may be entitled the plaintiff, Fostif Pty Limited, was acting "on behalf of ... the class of unnamed persons". The true position was that it was acting on its own behalf in seeking to recover the sum of money which it claimed to be entitled to.

223 Nor was it true to say that the plaintiff was acting on behalf of any member of that class in relation to any claim for any other sum of money. That is because the pleading had not alleged any dealings between any particular member of that class and the defendant which would entitle that member to any sum of money, and no sum of money based on any particular member's dealings with the defendant had been claimed.

224 Nor, when and if members of the "class of unnamed persons" become plaintiffs pursuant to the opt-in procedure, would it be true to say that the plaintiff, Fostif Pty Limited, was acting on their behalf when the proceedings began. Rather, the true position will be that, as plaintiffs, they will be acting on their own behalf, although no doubt, at least ostensibly, through the same legal team as the original plaintiff, Fostif Pty Limited.

225 In the light of those circumstances, it can be seen that the declaration claimed in *Carnie v Esanda Finance Corporation Ltd* was a crucial factor in the outcome of that case. Although that was a declaration claimed by the only two plaintiffs who existed, it could be described, as it was in par 6 of the statement of claim, as a claim "on behalf of themselves and all other persons" in the class described. Further, it was a claim which would affect the rights of the non-plaintiffs as well as the plaintiffs because, if acceded to, it would establish that none of them was liable to pay certain monies. And if the claim for a declaration were acceded to, pursuant to Pt 8 r 13(4) the declaration would bind the non-plaintiffs. Those non-plaintiffs thus had an "interest" in the proceedings which was the "same" as that of the plaintiffs, even though no opting-in procedure had been complied with, or even, at that point, devised.

226 The crucial claim in *Carnie v Esanda Finance Corporation Ltd* is not matched by any claim to a declaration in the proceedings under consideration here. The problem in the present appeal cannot be cured by amendment to seek a declaration now, and it could not have been cured had a declaration been sought in the summonses. That is because no declaration could legitimately have been claimed. In particular, taking the proceedings commenced by Fostif Pty Limited as an example, a declaration that the plaintiff and each of the members of the class of unnamed persons were entitled to be paid a particular sum of money could not legitimately have been claimed for two reasons. First, so far as the

plaintiff, Fostif Pty Limited, and any other person who became plaintiff pursuant to the opt-in procedure, are concerned, once the money judgment claimed in order 1 at the start of the summons was made in favour of each plaintiff who had established an entitlement to it, there would have been no utility in granting the declaration; it would have been surplusage. Secondly, so far as any other members of the "class of unnamed persons" are concerned, the summons made no allegation about any entitlement they had to be paid, and any declaration made of their entitlements would have gone beyond the pleadings.

227 Counsel for the respondent in *Mobil Oil Australia Pty Ltd v Trendlen Pty Ltd*[303], which was heard on the same day as, and together with, these appeals, were also counsel for the respondents in the present appeals. Counsel made an attempt to overcome these difficulties by appealing to Pt 8 r 13(4) and Pt 42 r 10(1) of the Supreme Court Rules. It is convenient to deal with that attempt here. Part 8 r 13(4) made a judgment entered in proceedings pursuant to Pt 8 r 13 binding on all the persons as representing whom the plaintiff sued. But it could not justify a judgment in favour of those persons unless facts sufficient to justify recovery in favour of them had been alleged or proved, and it could not be said that those persons had the same interest in the proceedings until the relevant facts were alleged. Here they have not been. Part 42 r 10(1) provided that where in any proceedings an order was made in favour of a person who was not a party, that person might enforce the order. But this does not overcome the difficulty created by the failure to plead facts showing that the members of the "class of unnamed persons" had the same interest in the proceedings.

228 Counsel for the respondent in *Mobil Oil Australia Pty Ltd v Trendlen Pty Ltd* also drew attention to the claim in *Carnie v Esanda Finance Corporation Ltd* for an "order that the defendant repay to the plaintiffs and any represented debtor any amount received by it on account of credit charges as defined by the Credit Act 1984, payable under the contracts from the date of the variation"[304]. Counsel then submitted that "[n]othing of substance can turn on the form of the orders seeking refunds, or on [the] fact that declarations were also sought." On the contrary, the application of Pt 8 r 13(1) must be considered with close attention to the precise formulation of the allegations and claims in the "proceeding" in which "numerous persons" are said to "have the same interest". The differences between the present case and *Carnie v Esanda Finance Corporation Ltd* cannot be brushed aside as turning on questions of form rather than of substance, at least

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303 [2006] HCA 42.

304 This order was claimed in sub-par (4) of the claims to relief, which is set out in Gleeson CJ's reasons for judgment in the Court of Appeal: *Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382 at 386.

so far as concerns the stress placed by Toohey and Gaudron JJ, in language quoted above, on the relief being in its nature beneficial to all whom the plaintiff proposes to represent, and on the fact that all those persons stand to be equally affected by the declaratory relief sought.

229 The appellants advanced many arguments for the view that Pt 8 r 13 did not apply. In view of the conclusion that it did not apply for the reasons set out above, it is not necessary to deal with them.

Abuse of process: factual aspects

230 In view of the conclusions just reached, it is not necessary to evaluate the Court of Appeal's rejection of the appellants' case on abuse of process. However, in view of what was said in argument, and what is said on the subject in other judgments, something ought to be added.

231 First, it is desirable to note some uncontroversial factual aspects.

232 *Firmstone & Feil.* Firmstone & Feil is a company, the sole beneficial owner and sole director of which is Mr Firmstone. Mr Firmstone is not a solicitor, but a chartered accountant. None of the company's employees hold practising certificates entitling them to practise law. The business of Firmstone & Feil is providing advice and assistance on indirect taxes. One aspect of that business was assisting retailers to recover from wholesalers amounts referable to the State tobacco licence fees that were held invalid by this Court on 5 August 1997 in *Ha v State of New South Wales*[305] and held liable to be repaid pursuant to this Court's decision in *Roxborough v Rothmans of Pall Mall Australia Ltd*[306]. Both Firmstone & Feil and another litigation funder had enjoyed success in obtaining recoveries from wholesalers in 2002 by means of settling litigation on favourable terms. Firmstone & Feil had never been a tobacco retailer. Before it interested itself in the recovery of amounts referable to the tobacco licence fees, one aspect of which relates to these appeals, it had no connection with the wholesalers, the retailers, or the subject-matter of the litigation.

233 *The Horwath arrangement.* In or about March 2002 Firmstone & Feil entered an arrangement with Horwath GST Pty Ltd ("Horwath"). Under that arrangement, Horwath was responsible for procuring tobacco retailers to

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305 (1997) 189 CLR 465.

306 (2001) 208 CLR 516.

participate in proposed litigation against certain wholesalers who, it was thought, were retaining amounts referable to the licence fees.

234 *The aggressive marketing campaign.* The trial judge found that pursuant to that arrangement Horwath conducted "an aggressive marketing campaign"[307]. It did so by word of mouth, by repeated letters on the letterhead of Firmstone & Feil from 5 March 2002 to 11 July 2003, and by advertisements in trade journals and in numerous regional and metropolitan newspapers.

235 *The engagement of Robert Richards & Associates.* In about mid September 2002 Mr Firmstone and Mr Robert Richards of Robert Richards & Associates orally agreed that Mr Richards would "be the project solicitor on the usual basis". By letter of 27 November 2002 Robert Richards & Associates clarified what that basis was by reference to the terms on which that firm had acted in relation to earlier matters: a letter of 6 April 2001 was referred to.

236 *The institution of non-representative proceedings.* On 11 February 2003, at the instigation of Firmstone & Feil, Robert Richards & Associates initiated proceedings in the Supreme Court of New South Wales on behalf of certain retailers against some of the appellant wholesalers. Those proceedings did not purport to be representative proceedings. It was expected that any further proceedings would be statute-barred unless instituted before July 2003 (six years after the time when the licence fee payments were made)[308].

237 *The institution of representative proceedings.* On 30 June 2003, shortly before the limitation period expired, 17 proceedings against 17 wholesalers were instituted on the instructions of Firmstone & Feil, as representative proceedings. Seven of these 17 proceedings are the subject of these appeals. The Court of Appeal described them as "a last ditch effort for all of their existing and anticipated clients to be able to recover"[309]. Each plaintiff had been approached by Mr Proud, a Firmstone & Feil employee, to act in this way as the "representative party on the summons". By July 2003, at least some hundreds of retailers – the parties disagreed about how many – had sent back to Firmstone & Feil signed forms authorising Firmstone & Feil to act on their behalf to obtain

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307 *Keelhall Pty Ltd t/as "Foodtown Dalmeny" v IGA Distribution Pty Ltd* (2003) 54 ATR 75 at 90 [24].

308 Before Einstein J the retailers said that the limitation period expired on 5 August 2003, while the wholesalers said it expired on 1 July 2003.

309 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 208 [5] and 217 [57] per Mason P (Sheller and Hodgson JJA concurring).

refunds in relation to tobacco licence fees on terms entitling retailers to two-thirds of what was recovered without risk as to costs. It was, however, common ground that despite the marketing campaign many more retailers had not shown any interest in suing wholesalers. Thus Mr Firmstone estimated that the number of potential claimants was 10,000, having claims averaging $4,000 in value. There was no evidence that the retailers who had returned signed forms had made any claim against a wholesaler, or would have done so if Firmstone & Feil, through Horwath, had not approached them.

238 *The discovery motions.* Shortly after the 17 proceedings commenced, Mr Firmstone gave instructions to Robert Richards & Associates to file notices of motion seeking orders that the defendant wholesalers give discovery of documents identifying any represented retailer to whom the relevant defendant had sold tobacco during the relevant period. By this means Mr Firmstone hoped to attract more plaintiffs to the litigation: once more retailers with potential claims were identified, they could be sent "opt-in" notices and thereby given an opportunity either to respond positively to those notices and become plaintiffs, or to elect to cease further participation in the proceedings. For their part, the defendants filed notices of motion seeking orders dismissing or staying the proceedings as an abuse of process, or orders that they not continue as representative proceedings.

239 *The opt-in notice authority and agreement.* The "opt-in" notice which Firmstone & Feil proposed to send, and its covering letter, indicated that if the retailer consented to become a plaintiff, it would be on terms similar to those stipulated in the letters sent out from 5 March 2002 to 11 July 2003. The pro forma "Opt-in Notice Authority and Agreement" relevantly provided for the retailer to:

> "2. authorise Firmstones Pty Ltd trading as Firmstone & Feil ('Firmstone & Feil') to act on my/our/its behalf in relation to:
>
> (i) the conduct of and the giving of instructions in the representative proceedings;
>
> (ii) entering into settlement agreement(s) with the defendant(s) (provided the amount is not less than 75% of the principal amount claimed from the defendant(s));
>
> (iii) to receive on my behalf all monies and any interest received from the defendant(s) as a result of judgment in or settlement of the representative proceedings; and
>
> (iv) to pay the said monies and any costs awarded to the plaintiffs into a trust account and to deduct therefrom the fees and costs referred to in 4(c) and (d).

3. undertake to execute a limited Power of Attorney authorising Adrian Firmstone to execute Deeds of Settlement and Release for the purpose of entering into any settlement agreement referred to in 2(ii); and

4. agree to the terms and conditions set out below:

   (a) Firmstone & Feil will pay all costs associated with the representative proceedings;

   (b) Firmstone & Feil will meet all costs orders made against the plaintiffs (including the represented retailers) in the representative proceedings;

   (c) Firmstone & Feil will receive 33⅓% of any amounts recovered by or on behalf of the plaintiffs (including the represented retailers) from the defendants by way of judgment or settlement of the representative proceedings;

   (d) Firmstone & Feil will retain any amounts awarded to the plaintiffs (including the represented retailers) in the representative proceedings as costs."

240 The principal difference between these terms and those notified to retailers earlier was that in the earlier terms Firmstone & Feil were not authorised to enter a settlement agreement unless the amount was not less than 100% of the principal amount claimed.

241 The Court of Appeal accepted the correctness of the trial judge's view that these terms gave Firmstone & Feil "control over settlement", and that this control "extend[ed] to the right to give instructions as to how the claims [were] to be moulded, what evidence to rely upon and similar matters".

242 *The solicitors' role.* It is implicit in these terms that the plaintiffs were not to be entitled to be represented in the proceedings by solicitors of their own choice. The role of Robert Richards & Associates was not explicitly described, although the retailers were to be invited to "return the completed Opt-In Notice to *our* solicitors, Robert Richards & Associates c/- Mr Peter Gibson at Horwath GST Pty Ltd"[310].

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310 Emphasis added.

243 There was one factual controversy about the solicitors' role. Einstein J found that the retainer between Mr Richards and Firmstone & Feil stipulated that Mr Richards would not directly liaise with the plaintiffs. He did so because, after Mr Firmstone and Mr Richards had orally agreed in September 2002 that Mr Richards would be "the project solicitor on the usual basis", Mr Richards sent the letter of 27 November 2002 from Robert Richards & Associates to Mr Firmstone referring to the letter of 6 April 2001 and stating that the future work "will be undertaken by me on the same terms (subject to the attached updated costs agreement) as those detailed in ... [the 6 April 2001] letter". The "attached updated costs agreement", headed "Terms of Engagement", set out various charges. In the 6 April 2001 letter Mr Richards said: "Whilst you are acting for your client you have engaged me as principal and not as agent for your clients." After describing some responsibilities which did not include client liaison, the letter continued:

> "I understand that you and your staff will provide assistance to me in respect of the matters.
>
> In particular –
>
> - you will be responsible for the day to day carriage of the matters. However you make copies of all documents (in respect of the matters) between yourself and your clients available to me. You will inform me of all material oral communications between yourself and your clients.
>
> - you will liaise with your clients. I will not directly liaise with your clients."

The expression "yourself" meant Firmstone & Feil, the expression "your clients" meant the clients of Firmstone & Feil, and the expression "I" meant Mr Richards.

244 The Court of Appeal disagreed with Einstein J's finding. It said[311]:

> "[t]he letter did not preclude the solicitor from communicating with his clients or those in the classes represented by them. At its highest, it stated an intention that Firmstone would be involved with client liaison. Mr Richards [sic] gave evidence that he never intended to abrogate any right of direct communication with his clients. His employed solicitor [sic] also

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311 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 222-223 [81] per Mason P (Sheller and Hodgson JJA concurring).

gave unchallenged evidence to similar effect. I see no reason why this evidence should not be accepted."

This reasoning is erroneous, given the following considerations.

(a) Mr Richards did not give evidence. Mr Firmstone did. He said in that evidence that he did not intend the statement "[Y]ou will liaise with your clients. I will not directly liaise with your clients" to be part of his arrangements with Mr Richards.

(b) No solicitor employed by Mr Richards gave evidence. An employee of Firmstone & Feil, Mr Proud, who was not a solicitor, did. However, he did not give evidence supporting the evidence of Mr Firmstone just mentioned, and he was not challenged on the point. The reason in each case was no doubt that he was not privy to dealings between Mr Firmstone and Mr Richards.

(c) Sections 175 and 177 of the *Legal Profession Act* 1987 (NSW), as they stood in September 2002, required solicitors to make written disclosure to clients of the basis of the costs of legal services to be provided to the clients. This can entail a description of legal services to which the costs relate. Certainly the letter of 6 April 2001, adopted by the letter of 27 November 2002, described the services to which the enclosed "costs agreement" related. The letter of 6 April 2001 recorded that the services of Robert Richards & Associates were engaged by Firmstone & Feil acting as principal, and not as agent for the clients of Firmstone & Feil. The description of the services specifically excluded liaison between Mr Richards and the clients of Firmstone & Feil. The only documents produced in answer to notices to produce directed to the plaintiffs and subpoenas directed to Mr Firmstone requiring production of documents relating to the retainer were the letters of 6 April 2001 and 27 November 2002.

(d) In these circumstances the uncommunicated reservations of Mr Firmstone were inadmissible on the construction of the retainer agreement.

245 Accordingly, the trial judge's conclusion that under the terms of his retainer Mr Richards was not to liaise directly with the plaintiffs is to be preferred.

Abuse of process: background principles

246 In *Mobil Oil Australia Pty Ltd v Victoria*, in which the questions directly arising here did not have to be answered, Callinan J referred to some of the

consequences of group or class proceedings and their conduct on an entrepreneurial basis[312]:

> "The question here is not whether, by their nature, group or class proceedings are oppressive to defendants, give rise to entrepreneurial litigation, in fact proliferate and prolong court proceedings, undesirably substitute private for public law enforcement or are contrary to the public interest, with disadvantages outweighing a public interest in enabling persons who have been damnified but who would not, or could not bring the proceedings themselves, to be compensated for their losses. The question simply is whether the Victorian Act is valid." (footnote omitted)

Because this is entrepreneurial legislation and for the other reasons which we explain these questions do have to be answered here.

247 The expression "litigation funding" is commonly used in the sense of a person organising, and paying the outgoings necessary for, the conduct of litigation on terms that the organiser will receive a share of the proceeds if the litigation succeeds. Among the principles which apply to it are the following.

248 A preliminary point is that under the Supreme Court Rules in force at the material time, a litigation funder was capable of engaging in abuse of process even though the funder was not a party to the proceedings[313].

249 Next, it is desirable to consider the law, so far as it survives and is relevant, of maintenance and champerty. Maintenance was the unlawful "intermeddling with litigation in which the intermeddler has no concern"[314]. Champerty was "maintenance aggravated by an agreement to have a part of the thing in dispute"[315].

250 Although the torts of maintenance and champerty were abolished by s 4 of the *Maintenance, Champerty and Barratry Abolition Act* 1993 (NSW), s 6

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312 (2002) 211 CLR 1 at 73 [172].

313 Part 52 r 4(2) provided that subject to sub-r (5) the court was obliged not to make a costs order against a non-party. Sub-r (5)(d) provided that sub-r (2) did not limit the power to make an order for payment of the costs of a party by a person who had committed an abuse of process.

314 *Neville v London "Express" Newspaper Ltd* [1919] AC 368 at 382 per Lord Finlay LC.

315 *Wild v Simpson* [1919] 2 KB 544 at 562 per Atkin LJ.

provided that that Act "does not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal".

251 The law of maintenance, and hence of champerty, rested on "considerations of public policy"[316]. "Notions of public policy are not fixed but vary according to the state and development of society and conditions of life in a community."[317] The relevant principle of public policy was "designed to protect the purity of justice and the interests of vulnerable litigants".[318] The expression "vulnerable litigants" has a special meaning. Thus according to Atkin LJ, the law of maintenance was "directed primarily, not at the client maintained, but at the other party to the litigation". That party "has the right to be free from litigation conducted by the assistance of persons working for their own interests, and not in order to give lawful professional aid to the opposing litigant"[319].

252 How could the purity of justice be affected by maintenance and champerty? Lord Denning MR gave three examples: "[T]o inflame the damages, to suppress evidence, or even to suborn witnesses"[320]. There is also "a public interest in preventing the development of an unlicensed and unregulated market in litigation for fear of the abuses to which that might lead by attraction of the unscrupulous"[321].

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316 *Stevens v Keogh* (1946) 72 CLR 1 at 28 per Dixon J, citing *Alabaster v Harness* [1895] 1 QB 339 at 342 per Lord Esher MR.

317 *Stevens v Keogh* (1946) 72 CLR 1 at 28 per Dixon J.

318 *Giles v Thompson* [1994] 1 AC 142 at 164 per Lord Mustill. In *Stocznia Gdanska SA v Latvian Shipping Co (No 2)* [1999] 3 All ER 822 at 831 Toulson J construed Lord Mustill's reference to the interests of vulnerable litigants as a reference to those who were in privity with the person responsible for the maintenance or the champertous conduct, since he referred to "a public interest in seeing that vulnerable litigants are protected from opportunistic exploitation". With respect, this is out of accord with traditional principle.

319 *Wild v Simpson* [1919] 2 KB 544 at 563; *Giles v Thompson* [1993] 3 All ER 321 at 336 per Steyn LJ; *Clairs Keeley (a Firm) v Treacy* (2003) 28 WAR 139 at 171 [192] per Pullin J.

320 *In re Trepca Mines Ltd (No 2)* [1963] Ch 199 at 220.

321 *Stocznia Gdanska SA v Latvian Shipping Co (No 2)* [1999] 3 All ER 822 at 831 per Toulson J.

253 There are numerous areas in which the proscriptions effected by the principles of maintenance and champerty do not apply. Among them are statutory exceptions[322]; the provision of assistance out of motives of friendship, family relationships[323], charity or compassion[324]; and the provision of assistance by landlords to tenants[325] and by employers to employees[326]. Others relate to special fields like insurance[327], trade unions[328] and trade associations and persons with a common interest[329].

254 In *Clyne v NSW Bar Association*[330], Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer JJ said, obiter, that a solicitor may act for a client, and spend money in payment of outgoings even though there is no prospect of fees being paid or outgoings repaid unless a judgment against the other party to the proceedings is obtained, on two conditions. The first is that the solicitor has considered the case and believes that the client has a reasonable cause of action or defence[331]. The second is that the solicitor must not bargain with the client for "an interest in the subject-matter of litigation, or (what is in substance the same thing) for remuneration proportionate to the amount which may be recovered" by

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322 For example, *Legal Profession Act* 1987 (NSW), ss 186-187; *Corporations Act* 2001 (Cth), s 477(1)(c).

323 *Bradlaugh v Newdegate* (1883) 11 QBD 1 at 11 per Lord Coleridge CJ.

324 *Harris v Brisco* (1886) 17 QBD 504 at 513 per Lord Esher MR, Bowen and Fry LJJ.

325 *Alabaster v Harness* [1895] 1 QB 339 at 343 per Lord Esher MR.

326 *Bradlaugh v Newdegate* (1883) 11 QBD 1 at 11 per Lord Coleridge CJ.

327 *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101.

328 *Stevens v Keogh* (1946) 72 CLR 1.

329 *Martell v Consett Iron Co Ltd* [1955] Ch 363 at 386-387 per Danckwerts J.

330 (1960) 104 CLR 186 at 203.

331 In *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 204 the Court quoted Lord Russell of Killowen CJ as charging a jury in terms requiring that the solicitor take "pains" and employ "careful inquiry" to determine whether a "bona fide" cause of action existed: *Ladd v London Road Car Co* (1900) 110 LT (NS) 80, approved in *Rich v Cook* (1900) 110 LT (NS) 94.

the client in the proceedings[332]. In debates about this matter, reference is sometimes made to *Giles v Thompson*[333], where Lord Mustill said that the latter aspect was "now in the course of attenuation" and "survives nowadays, so far as it survives at all, largely as a rule of professional conduct". Whether or not that is so in England, no authority of this Court has held it to be so in Australia, and s 6 of the *Maintenance, Champerty and Barratry Abolition Act* preserves the second condition. In any event, Lord Mustill's observations, read in context, were directed to maintenance and champerty considered as crimes and torts rather than from the point of view of public policy. No equivalent to the first condition exists for litigation funders who are not solicitors[334]. An intervener pointed to the High Court's view that a solicitor who complied with the above conditions was behaving in a manner "perfectly consistent with the highest honour"[335]. The intervener suggested an analogy between the position of the solicitor and the position of Firmstone & Feil. If there is, it is fatal to the respondents' position in these appeals because of non-compliance with the second condition.

Abuse of process: aspects of the Court of Appeal's reasoning

255 *"Champertous intermeddling".* First, the Court of Appeal criticised Einstein J for relying on Firmstone & Feil's "champertous intermeddling"[336] in determining whether the proceedings were an abuse of process. This criticism is not sound. Whether or not champertous intermeddling alone is sufficient to justify a conclusion that the proceedings are an abuse of process, the existence of matters of fact which make the conduct champertous intermeddling is a relevant factor.

256 *Relevance of "access to justice".* Secondly, the Court of Appeal said: "The law now looks favourably on funding arrangements that offer access to

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332 *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 203.

333 [1994] 1 AC 142 at 153 (Lords Keith of Kinkel, Ackner, Jauncey of Tullichettle and Lowry agreeing).

334 Although the materials brought to the attention of retailers, as well as Mr Firmstone's affidavits, exuded an air of optimism about the proceedings, he did not state a belief that either he himself or anyone else had carefully considered the case and believed that the client had a reasonable cause of action.

335 *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 204.

336 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 227 [104] per Mason P (Sheller and Hodgson JJA concurring).

justice so long as any tendency to abuse of process is controlled."[337] It would be truer to say that the law prevents litigation funding contracts from being enforced, even though they may offer access to justice, if they have the character of maintenance or champerty, and the law looks neutrally on the prosecution of the proceedings being funded unless they are an abuse of process. Of the four cases cited by the Court of Appeal in support of the proposition stated only one actually supports it. Two of the cases do not support it[338], and one is against it[339]. In the fourth, *Gulf Azov Shipping Co Ltd v Idisi*, the English Court of Appeal stated[340]:

> "Public policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation."

But that statement was made in relation to circumstances very different from the present. Any suggestion that the principles of abuse of process have been diminished by a more "relaxed common law attitude to litigation funding"[341] because of a recent recognition of the importance of assisting impecunious plaintiffs to sue is unrealistic. The importance of not preventing "humble men" from receiving "contributions to meet a powerful adversary"[342] has been long recognised, and underlies the exceptions to the common law doctrines of maintenance and champerty. The facilitation of access to justice, however, is not to be treated as having absolute priority over traditional principle.

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337 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 227 [105] per Mason P (Sheller and Hodgson JJA concurring).

338 *Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116 at 151 [59] per Morritt and May LJJ and Wall J; *Gore v Justice Corporation Pty Ltd* (2002) 119 FCR 429 at 450 [59] per O'Loughlin, Whitlam and Marshall JJ.

339 *Re William Felton & Co Pty Ltd* (1998) 145 FLR 211 at 220 per Bryson J.

340 [2004] EWCA Civ 292 at [54] per Lord Phillips MR.

341 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 227 [107] per Mason P (Sheller and Hodgson JJA concurring).

342 *Martell v Consett Iron Co Ltd* [1955] Ch 363 at 386 per Danckwerts J.

257 *"Trafficking in litigation".* Thirdly, the Court of Appeal correctly said that the cases condemn "trafficking in litigation"[343]. It also said, understandably, that the content of that expression is "elusive"[344]. It certainly can be. Sometimes it is used as little more than a term of abuse. Sometimes it is employed in a circular or indeterminate fashion. An example is *Stocznia Gdanska SA v Latreefers Inc (No 2)* where the English Court of Appeal said that the expression connoted "unjustified buying and selling of rights to litigation where the purchaser has no proper reason to be concerned with the litigation"[345]. The Court also said that "'[w]anton and officious intermeddling with the disputes of others in which they [the funders] have no interest and where that assistance is without justification or excuse' may be a form of trafficking in litigation."[346] These propositions lack full definition until one knows what is meant by "unjustified", "proper", "wanton and officious", "interest" and "justification or excuse".

258 But the cases do point to some clear criteria. As between the funder and the party funded, there is "trafficking" in causes of action where they are assigned by the latter to the former in circumstances where there is neither any transfer of any property interest to which the causes of action are ancillary nor any genuine commercial interest which the funder has in taking the assignment of the causes of action and enforcing them for the funder's own benefit. Although the term "genuine commercial interest" calls for further definition, in

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343 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 227 [107] per Mason P (Sheller and Hodgson JJA concurring).

344 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 227 [107] per Mason P (Sheller and Hodgson JJA concurring).

345 [2001] 2 BCLC 116 at 152 [61].

346 The English Court of Appeal attributed these words to Lord Mustill in *Giles v Thompson* [1994] 1 AC 142; in fact in that case Lord Mustill, at 161, quoted similar words used by Fletcher Moulton LJ in *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006 at 1014. Of this passage Millett LJ said in *Thai Trading Co v Taylor* [1998] QB 781 at 786: "The language and the policy which it describes are redolent of the ethos of an earlier age when litigation was regarded as an evil and recourse to law was discouraged. It rings oddly in our ears today when access to justice is regarded as a fundamental human right which ought to be readily available to all." Whether this is so may depend on the kind of litigation, the amount at issue, the extent to which the plaintiff controls the litigation, and the extent to which the plaintiff will benefit from it. These matters are considered below at [267]-[283].

this sense to traffic in litigation is to attempt an invalid assignment of a bare cause of action, or to enter a champertous agreement[347].

259 The Court of Appeal questioned whether in New South Wales there truly existed "any residual category of 'trafficking'"[348]. In the usage just described, the category does exist. It is true, however, that even that kind of usage does leave open the question: "In what circumstances will the presence of 'trafficking in causes of action' entitle the defendant to the litigation brought on those causes of action to a stay of it?"

260 *Assignability of retailers' claims.* Fourthly, the Court of Appeal also offered the tentative view, on an issue not debated before it, although it received some mention before this Court, that "the retailers' causes of action ... for money had and received" were "historically a claim in debt", and that debts are readily assignable "without apparently engaging the principles about trafficking"[349]. There is a serious question about whether the Court of Appeal was right[350].

261 But even if the alleged right of the retailers were otherwise assignable, an assignment of those rights in consideration of the payment by Firmstone & Feil of a proportion of the amount recovered would be champertous and unenforceable[351]. If the transaction between Firmstone & Feil and each retailer had taken the form of an assignment to Firmstone & Feil so that it could sue as plaintiff, the claim would fail because the assignment would be ineffective. Whether in an endeavour to escape that consequence, or for some other reason, the transaction took a different form. But, contrary to the respondents'

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347 See *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 at 703 per Lord Roskill; *Kaukomarkkinat O/Y v "Elbe" Transport-Union GmbH (The "Kelo")* [1985] 2 Lloyd's Rep 85 at 89 per Staughton J.

348 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 232 [122] per Mason P (Sheller and Hodgson JJA concurring).

349 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 232 [123] per Mason P (Sheller and Hodgson JJA concurring).

350 It relied on *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 176 per Brennan J. Compare Mason CJ in the same case at 173, and *Poulton v The Commonwealth* (1953) 89 CLR 540 at 602 per Williams, Webb and Kitto JJ.

351 *Laurent v Sale & Co (a Firm)* [1963] 1 WLR 829 at 831; [1963] 2 All ER 63 at 65; *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 at 695 per Lord Wilberforce.

submissions, the substance is the same. In substance, the contemplated transactions depended on persons having rights to sue giving up those rights in consideration of receiving two-thirds of what Firmstone & Feil were able to recover by verdict from the court or by settlement out of court (provided the settlement exceeded 75% of the face value of the principal claimed, or authority to settle for less were given). Similar transactions were said in *Clairs Keeley (a Firm) v Treacy*[352] to constitute de facto assignment of the plaintiffs' causes of action. It is not necessary to decide whether that is so here. What is clear is that the degree of control which Firmstone & Feil has over the litigation, independently of instructions from the plaintiffs or input from the solicitors for the plaintiffs, reveals that the plaintiffs are close to ciphers. They are not conducting the actions in which they are named as plaintiffs to enforce their rights to sue by means of funding from Firmstone & Feil for a commission of one-third of the amounts recovered; rather Firmstone & Feil is conducting their actions for its own benefit, in consideration of a payment to the plaintiffs of two-thirds of the recovery.

262 *Relevance of maintenance and champerty to stays.* Fifthly, the Court of Appeal considered that maintenance or champerty did not make the proceedings to which they related capable of being stayed. In their view a stay could only be granted if there were an abuse of process. They said[353]:

> "[A] conclusion about abuse of process must stem from a finding directed at the actual or likely conduct of the party in whose name the litigation is brought (or its agents). The court is not concerned with balancing the interests of the funder and its clients. Indeed, it is not concerned with the arrangements, fiduciary or otherwise, between the plaintiff and the funder except so far as they have corrupted or have a tendency to corrupt the processes of the court in the particular litigation. It is only when they have that quality that the defendant has standing to complain about them."

On that basis they criticised the view of the Full Court of the Supreme Court of Western Australia in *Clairs Keeley (a Firm) v Treacy*[354] that an abuse of process arises where litigation is pursued "in such a way that the interests of the plaintiffs are subservient to those of the funder".

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352 (2003) 28 WAR 139 at 163 [134] per Templeman J (Parker, Wheeler and Pullin JJ concurring).

353 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 229 [114] per Mason P (Sheller and Hodgson JJA concurring). See also at 234 [132].

354 (2004) 29 WAR 479 at 493 [71] per Steytler, Templeman and McKechnie JJ.

263 There was perhaps an excessive concentration in the arguments of the appellants, and hence in the minds of those concerned to refute those arguments, with questions about how far the public policy relating to maintenance and champerty survives. It is preferable to consider the matter from the point of view of abuse of process generally. It does not follow that factors relevant to maintenance and champerty are not also relevant to abuse of process.

264 For present purposes, however, it may be assumed that:

(a) any harshness in the terms of dealing between the funder and those being funded does not of itself create an abuse of process[355]; and

(b) the existence of maintenance or champerty does not of itself create an abuse of process sufficient to grant a stay (nor did the appellants so contend)[356].

265 However, it is clear that in particular cases the facts which make an agreement champertous, whether taken by themselves or taken with other facts, may also cause the prosecution of proceedings under the agreement to be an abuse of process.

266 Further, it is not the law that proceedings funded by a litigation funder can only be stayed on the ground of abuse of process if there is an actual corruption, or a tendency to corruption, of the processes of the court. The approach stated by the Court of Appeal is much stricter than, and does not accord with, that which is suggested by the expression "abuse of process". The expression is a wide one, capable of application in very diverse circumstances. But, in general, the aspect

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355 This fits in with the traditional view, discussed above at [251], that the law of maintenance and champerty, and the principles underlying it preserved by s 6 of the Act, are directed not to the client maintained but the other party to the litigation.

356 Some English cases hold that a stay is not to be granted merely on the ground that there is maintenance: *Martell v Consett Iron Co Ltd* [1955] Ch 363 at 388-389 per Danckwerts J; see also at 422 per Jenkins LJ and 429 per Hodson LJ (on appeal); *Abraham v Thompson* [1997] 4 All ER 362 at 374 per Potter LJ. Einstein J himself was of this view in the present case: *Keelhall Pty Ltd t/as "Foodtown Dalmeny" v IGA Distribution Pty Ltd* (2003) 54 ATR 75 at 99 [52]. See also *Roux v Australian Broadcasting Commission* [1992] 2 VR 577 at 608-609 per Byrne J. Some hold that a stay can be granted merely on the ground of maintenance: for example, *Grovewood Holdings plc v James Capel & Co Ltd* [1995] Ch 80 at 87-89 per Lightman J. Some reserve their opinion: *Wild v Simpson* [1919] 2 KB 544 at 564 per Atkin LJ.

of "abuse of process" which is relevant for present purposes is that the process of the court is abused when it is employed for some purpose other than that which it is intended by the law to effect[357]. The justifications for the court's intervention against this kind of abuse of process as exemplified by some forms of litigation funding are diverse. Court process is expensive for the State to supply and for litigants to participate in. It is coercive and otherwise injurious both to litigants and to third parties and should not be employed beyond legitimate necessity. To the extent that people with urgent claims are held out from having them heard by actions in abuse of process, the latter actions should be stayed so that the former may be heard. Normal litigation is fought between parties represented by solicitors and counsel. Solicitors and counsel owe duties of care and to some extent fiduciary duties to their clients, and they owe ethical duties to the courts. They can readily be controlled, not only by professional associations but by the court. The court is in a position to deploy, speedily and decisively, condign and heavy sanctions against practitioners in breach of ethical rules. The appearance of solicitors is recorded on the court file. Institutions like Firmstone & Feil, which are not solicitors and employ no lawyers with a practising certificate, do not owe the same ethical duties. No solicitor could ethically have conducted the advertising campaign which Firmstone & Feil got Horwath to conduct. The basis on which Firmstone & Feil are proposing to charge is not lawfully available to solicitors. Further, organisations like Firmstone & Feil play more shadowy roles than lawyers. Their role is not revealed on the court file. Their appearance is not announced in open court. No doubt sanctions for contempt of court and abuse of process are available against them in the long run, but with much less speed and facility than is the case with legal practitioners. In short, the court is in a position to supervise litigation conducted by persons who are parties to it; it is less easy to supervise litigation, one side of which is conducted by a party, while on the other side there are only nominal parties, the true controller of that side of the case being beyond the court's direct control. Finally, the function of court proceedings is to provide a means of quelling real and active controversies that have arisen between persons who are unfortunate enough to have fallen into disputes with each other and that exist independently of and anterior to the

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357 In *Walton v Gardiner* (1993) 177 CLR 378 at 393, Mason CJ, Deane and Dawson JJ approved the reference of Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536 to "the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people". The last expression is indeterminate, but employment of the court's process for some purpose other than that which it is intended to effect would bring the administration of justice into disrepute among right-thinking people.

commencement of the proceedings. The purpose of court proceedings is not to provide a means for third parties to make money by creating, multiplying and stirring up disputes in which those third parties are not involved and which would not otherwise have flared into active controversy but for the efforts of the third parties, by instituting proceedings purportedly to resolve those disputes, by assuming near total control of their conduct, and by manipulating the procedures and orders of the court with the motive, not of resolving the disputes justly, but of making very large profits. Courts are designed to resolve a controversy between two parties who are before the court, dealing directly with each other and with the court: the resolution of a controversy between a party and a non-party is alien to this role. Further, public confidence in, and public perceptions of, the integrity of the legal system are damaged by litigation in which causes of action are treated merely as items to be dealt with commercially.

The factors pointing to abuse of process

267 These proceedings constitute an abuse of process by reason of several factors considered in combination. It is not necessary to decide whether a different result would be produced by the removal of some factors but not others. However, in view of the wide variety of possible funding arrangements, a different conclusion may be reached in other cases.

268 The factors which in combination point to abuse of process are as follows.

269 *Firmstone & Feil's motive of profiting from the litigation of others.* Firmstone & Feil's assistance was not given out of charity or compassion. It was not given on the basis that the poor were being oppressed by the rich[358]. Firmstone & Feil is not, to use a phrase which sprang up in argument, "a generous spirited company who are trying to bring people to justice". It has no public duties, nor is it held to public account, in the same way as an Attorney-General or other public servant[359]. The Court of Appeal found that Firmstone & Feil's "motives were not altruistic"[360]. Mr Firmstone himself agreed that his company's involvement in the proceedings constituted "a speculative investment ... in other persons' litigation". The profit which Firmstone & Feil were seeking was to be derived entirely from the litigation itself. It was not to stem from the

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358 *Harris v Brisco* (1886) 17 QBD 504.

359 See generally Beisner, Shors and Miller, "Class Action 'Cops': Public Servants or Private Entrepreneurs?", (2005) 57 *Stanford Law Review* 1441.

360 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 232 [124] per Mason P (Sheller and Hodgson JJA concurring).

vindication of any pre-existing right of Firmstone & Feil's. Firmstone & Feil had no interest in the proceedings, whether individual or shared with a plaintiff, beyond the chance of winning one-third of the proceeds. The wrongs allegedly done by the wholesalers to the retailers were not done to Firmstone & Feil. Firmstone & Feil had no proprietary or commercial interest in the retailers' businesses. Many of the retailers had been in commercial relations with the wholesalers for years before the critical period in 1997, and those relations have continued since that time. Firmstone & Feil has never been in commercial relations with the wholesalers, and is seeking to intrude into and "meddle" with the relations between the wholesalers and the retailers to which it is not party for reasons of personal profit.

270 *Firmstone & Feil sought out and encouraged persons to sue who would not otherwise have done so.* The retailers did not seek the assistance of Firmstone & Feil to fund the litigation. Instead, Firmstone & Feil sought out the retailers and attempted to persuade them to sue. The key to the persuasion was the intended representation that the plaintiffs who were to join the representative proceedings bore no risk. The explicit language of one item of publicity corresponded with the theme of many others: "WHAT HAVE YOU GOT TO LOSE?????" In conventional litigation some restraint is placed on the desire to start litigation by the risk of having to pay the defendant's costs if the litigation fails. Firmstone & Feil's plan removed that restraint[361]. Although Firmstone & Feil, not being a firm of solicitors, was not able to offer legal advice about the proceedings, the publicity did not provide a balanced description of the nature or consequences of the proposed litigation, which removed further restraints from the retailers agreeing to let Firmstone & Feil go ahead.

271 The respondents hinted at the almost dishonourable stance of the wholesalers in refusing to pay up in the face of cases against them which were so factually and legally simple as to be open and shut, and made submissions about the smallness and poverty of the retailers and about how commencing litigation, retailer by retailer, to recover small sums would be economically impossible. However, there was no evidence that any retailer solicited by Firmstone & Feil had ever made a claim on a wholesaler who is a defendant in the present proceedings, that any such wholesaler had ever refused to pay, that without Firmstone & Feil's intervention any retailer who has sued would have done so, that any retailer to be invited to opt-in would do so without that intervention, or that any retailer had joined the representative proceedings apart from the lead plaintiffs. The respondents argued that many retailers had made claims against other wholesalers as a result of aid from another litigation funder, but they did not submit that these claims were not themselves the result of solicitation by that

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361 See *Clairs Keeley (a Firm) v Treacy* (2003) 28 WAR 139 at 173 [203] per Pullin J.

funder. Rather they submitted that many or most of the retailers were unaware of their claims, and hence were parties "who most need access to justice". There was in fact no evidence of this supposed unawareness either. The only evidence on the willingness of retailers to join any of the 17 proceedings is one letter from a retailer dated 4 June 2003 advising Mr Firmstone that it did not wish to sue. This retailer was described in argument, without contradiction, as a large organisation. In short, this part of the respondents' argument proceeded by slogan rather than evidence, and by allusions to complex forms of "class" proceedings as if they were relevant to the present proceedings, which for some purposes the respondents chose to characterise as being so simple that it was scandalous that they had to be brought at all. On the evidence, it is clear that Firmstone & Feil sought to create a dispute which did not otherwise exist, to make it the subject of litigation, to wrest control of the conduct of the litigation from the nominal plaintiffs, and to extract as the price for this activity a substantial part of each plaintiff's potential proceeds. Thus it may be said to have engaged in "officious intermeddling" with "the disputes of others" which, but for its conduct, would not have existed and in which it had no interest[362].

272 *Nature and smallness of the plaintiffs' "losses"*. As has just been noted, the respondents made much of the bona fide nature and validity of the "small but strong" claims of the retailers, of the retailers' ignorance of their claims, of their incapacity, without assistance, to advance their claims because of their smallness balanced against the cost of individual recovery, of the recalcitrance of the wholesalers in not complying with their just obligations, and of the strong incentives for the wholesalers to engage in litigation which would be "nasty, brutish and *long*"[363]. The respondents submitted that the risk of abuse of process had to be weighed against the plaintiffs' interest in the litigation and the fact that they were suing wholesalers who were unwilling to pay them, and who were experienced, determined and well-resourced. The evidentiary hole behind many of these arguments has already been noted, and the respondents resorted to more abstract contentions. It was said that for the court to stay the litigation was "contrary to the traditional respect of the common law for the autonomy of the individual". Other blessed phrases like "access to justice" and "equality of arms" were referred to in their arguments or were adopted by them. The respondents relied on a statement of the Full Federal Court that there was no cause for instant alarm if, in these circumstances, "a business house, openly and reasonably,

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362 See *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006 at 1014 per Fletcher Moulton LJ, adopted in *Giles v Thompson* [1994] 1 AC 142 at 161 per Lord Mustill (Lords Keith of Kinkel, Ackner, Jauncey of Tullichettle and Lowry agreeing).

363 Emphasis in respondents' submissions.

wishes to engage in the business of funding litigation and is prepared to meet the costs of the opposing party"[364]. Additionally, the Court of Appeal described the wholesalers' retention of the relevant monies as a "windfall gain"[365], and the respondents took that description up.

273 That description is a true one. On the other hand, in *Roxborough v Rothmans of Pall Mall Australia Ltd*, five members of this Court pointed out that the retailers who obtained the relevant monies by court order were also making "a windfall gain"[366] in view of the difficulties those smokers who bought from the retailers would have in recovering their share of the monies. Here, as there, it cannot be said that the retailers indicated "the slightest interest in recovering the whole, or any part, of the windfall for the benefit of the consumers. They wanted the windfall for themselves."[367] Although the law may permit retailers falling within the class involved in this appeal which can prove their case to enjoy recovery, and although the recovery of sums paid on a consideration which has failed may seem to involve the recovery of "loss", no loss need be proved, and it is wrong to assume that the recovery by the retailers targeted by Firmstone & Feil necessarily equates to recovery by persons who are truly out of pocket. The persons who are truly out of pocket are those who purchased tobacco products from retailers who passed on the licence fee component, and as the respondents conceded, here that component was passed on in every case. Where retailers who make a claim are claiming a windfall gain from wholesalers who wish to retain what is in their hands a windfall gain, there is nothing in that aspect of the position of the former group which weighs favourably in assessing whether the proceedings should be stayed as an abuse of process.

274 There are other noteworthy aspects of the claims. The sums to be claimed would be claimed, in many cases, by retailers who had been in continuing business relationships with wholesalers and would be likely to wish to remain in them. It is understandable that there is no evidence that any of them wished to make a claim or to sue until Firmstone & Feil persuaded them to do so. Traditionally it has been thought that to provoke litigation to take place which would not otherwise have taken place is undesirable. It is an idea which underlay

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364 *Gore v Justice Corporation Pty Ltd* (2002) 119 FCR 429 at 451 [59] per O'Loughlin, Whitlam and Marshall JJ.

365 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 218 [67] per Mason P (Sheller and Hodgson JJA concurring).

366 (2001) 208 CLR 516 at 522 [5] per Gleeson CJ, Gaudron and Hayne JJ, 559-560 [114]-[116] per Kirby J, 591 [204] per Callinan J.

367 (2001) 208 CLR 516 at 559-560 [114] per Kirby J.

maintenance and champerty[368]. But it is not limited to those fields. It is one thing to fund plaintiffs who wish to sue independently of the persuasion of the funder. It is another thing to fund plaintiffs who, but for the funding, would not have sued at all. This point was made by Pullin J in *Clairs Keeley (a Firm) v Treacy*[369]:

> "Losses suffered by some members of the community might be regarded by those persons as a vicissitude of life. Those persons, left to their own devices, may choose not to sue. It is not a failure of the system that some members of the community choose not to sue, even if there has been a breach of duty by some person or another. Persons suffering injury should not be encouraged to commence proceedings if they would, left to their own devices and based on their own assessment of the risks, not have contemplated litigation. However, such persons are likely to be willing to pursue litigation if they bear no risk of an adverse outcome."

Whether or not, as the Court of Appeal thought, the law now looks favourably on funding arrangements, it is highly questionable whether the law looks favourably on litigation by a plaintiff to cover small sums of the order of rather less or rather more than $4,000[370]. Lawsuits are to be dreaded "beyond almost anything else short of sickness and death"[371]. Ought not at least Supreme Court litigation of

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368 See *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006 at 1020 per Buckley LJ.

369 (2003) 28 WAR 139 at 172 [196].

370 Precisely what sums were claimable is obscure. The figure of $4,000 as being the size of the average claim was one accepted in Mr Firmstone's evidence. That figure is not necessarily falsified by the publicity directed to retailers, which spoke of refunds of at least $10,000 or $11,250 being possible. An advertisement in the *Daily Telegraph* said: "A typical retailer could expect a refund of about $15,000." The point made in the text stands, even for those claiming more than $4,000. In the seven sets of proceedings affected by the present appeals, Fostif Pty Ltd claimed $3,143.20, Mr Berney claimed $2,039.85, Whelan & Hawking Pty Ltd claimed $7,899.04, the two Murrays claimed $657.47, the two Neindorfs claimed $2,563.35, the two Williamsons claimed $8,947.63, and the five plaintiffs in the Gow and Green proceedings claimed a total of $22,939.58. The Court of Appeal mentioned "an average claim of $1,000 or perhaps a little more", but the evidentiary basis for this is unclear: *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 237 [149] per Mason P (Sheller and Hodgson JJA concurring).

371 Judge Learned Hand, "The Deficiencies of Trials to Reach the Heart of the Matter", in Rosenberg, *Lectures on Legal Topics 1921-1922* (1926) 87 at 105.

that kind be discouraged, as a foolish way for a plaintiff to spend time and money and nervous energy? If so, litigation instituted by one such plaintiff representing many others is no more attractive. Plaintiffs may sue if they wish, but it is not easy to see why the courts should decline to characterise proceedings as an abuse of process merely because they permit litigation funders avaricious for large recoveries to foment litigation by numerous parties making claims to small sums of money which, although they may be legally entitled to them, they never in truth lost.

275 *Gains hoped for by Firmstone & Feil.* The gains which Firmstone & Feil might make from the proceedings are potentially enormous. On the assumption that there are 10,000 retailers each with an average claim of $4,000, and on the assumption that interest would by now amount to at least 50% of the principal sum claimed, if all of them opted-in, Firmstone & Feil would be entitled to about $20 million plus costs recovered from the wholesalers less costs expended but not recovered from the wholesalers. Yet another estimate was at least $100 million for "the amounts the subject of the claims in ... all of the proceedings presently before the court", but it was not clear if this included interest. On that basis, if all went well, Firmstone & Feil would get over $30 million.

276 Of course the enterprise was attended by risks. Many retailers might not opt-in. Many claims might be unprovable. But, making all allowances and discounts, the potential recovery is on a scale which no solicitor who dealt with clients on these terms could ethically defend. A solicitor who requested retailers to opt-in on Firmstone & Feil's terms, or charged fees of equivalent economic worth, would not long remain on the roll. The respondents did not explain why litigation funders, untrammelled by ethical rules or supervisory professional bodies, should be able to conduct litigation on terms which no solicitor could.

277 *Firmstone & Feil's control of the litigation.* It is a factor pointing against an abuse of process that the funder of litigation "does not meddle at all"[372] or by its contract is left "very little room to intermeddle"[373]. Conversely, the more room to intermeddle, the more likely is it that the litigation is an abuse of process. To some extent the respondents challenged that proposition, asserting that Firmstone & Feil were better placed to prosecute the litigation than the retailers. But the respondents did not otherwise explain why the proposition was unsound. Here any retailer agreeing to opt-in to the litigation would do so on terms giving Firmstone & Feil total control of it.

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372 *Giles v Thompson* [1994] 1 AC 142 at 161 per Lord Mustill (Lords Keith of Kinkel, Ackner, Jauncey of Tullichettle and Lowry agreeing).

373 *QPSX Ltd v Ericsson Australia Pty Ltd (No 3)* (2005) 219 ALR 1 at 16 [61] per French J.

278 The respondents relied on three matters to negate control: Firmstone & Feil could not settle the litigation for less than 75% of the principal claimed; Firmstone & Feil retained a solicitor; Firmstone & Feil took advice from counsel. The fact is that but for the settlement limit, Firmstone & Feil's power to control was absolute, and it exercised it accordingly. Counsel did no more than settle the form of the summonses. The constricted role of the solicitor is noted elsewhere[374]. Mr Proud, an employee of Firmstone & Feil, drafted the summonses, had them settled by counsel, selected retailers to be approached as "lead plaintiffs", persuaded them to act on that basis, and obtained from them some relevant information. Although the retailers were told, or to be told, that Firmstone & Feil would pay the costs associated with the proceedings, they were not told of their potential liability to costs orders, nor of the precise financial capacity of Firmstone & Feil to meet them. That is the fact, even though Firmstone & Feil sought to overcome the difficulty before Einstein J by offering undertakings to the court to submit to such orders as to costs as the court might make, and to meet any orders as to costs as might be made against the plaintiffs or any represented person, and Mr Firmstone offered an undertaking to the court to underwrite any shortfall in payments by Firmstone & Feil up to a limit of $1 million. In addition, the retailers were not told that they or their officers might have to give evidence; they were not given any legal advice received by Firmstone & Feil.

279 Further, Mr Firmstone had not instructed Robert Richards & Associates to inform the plaintiffs in the representative proceedings of the defendants' motions to strike them out, and neither he nor, as far as he knew, Robert Richards & Associates had communicated with them on any subject, although Mr Richards did communicate with some of them by means of a standard form letter in relation to a notice to produce. It enclosed some "Notes on Discovery". That letter suggests an absence of any prior contact, since it commences: "We are the solicitors on record engaged on your behalf by Firmstone & Feil in relation to the representative legal proceedings". There is no evidence that anyone provided any plaintiff with a copy of the relevant summons: Mr Proud did not do this, and as far as he knew no-one else had. The same is true of the plaintiffs' notices of motion for discovery.

280 The question is not, as the Court of Appeal seemed to think, whether Mr Richards had conformed with his professional obligations: it is not suggested that he did not. The question is whether the limited role assigned to Mr Richards facilitated Firmstone & Feil's control of the proceedings. That role is relevant, in view of an earlier assumption, not as evidencing some breach of duty or unconscionable conduct on the part of Firmstone & Feil towards the retailers and

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374 Above at [242]-[245]; below at [282].

the plaintiffs, but as a badge of Firmstone & Feil's indifference to them. That indifference to the retailers was understandable, for despite the use of the name of the lead plaintiffs, and the proposed use of the names of other retailers in the event that they opted-in, the real character of the proceedings was as a means of earning Firmstone & Feil large sums and each plaintiff only a very small sum. The real character of the proceedings was that they were started by Firmstone & Feil, not by the lead plaintiffs, and that they would be continued by Firmstone & Feil, not by the lead plaintiffs and any extra plaintiffs who opted-in.

281 *Subservience of the retailers' interests to those of Firmstone & Feil.* The pursuit of the litigation in such a way as to render the interests of the nominal plaintiffs subservient to those of the funder is capable of being an abuse of process[375]. The respondents denied the possibility of conflicts of interest. The point is not that there may be conflicts of interest between funder and plaintiffs. The point is rather that the subserviency reveals the real nature of the proceedings. Here the large share of recoveries to which Firmstone & Feil were entitled accentuated the disparity between the vast sums which Firmstone & Feil might make and the relatively petty sums each retailer might recover. This, coupled with the control given to Firmstone & Feil, reveals that the proceedings were in truth being employed for a purpose alien to their legitimate function – the advantaging of the interests of the funder in its speculative investment rather than those of the retailers. Of course the retailers had to win for the funder to profit, but their success was only the means to a single end – the profit of Firmstone & Feil. The real character of the proceedings was not the vindication of the plaintiffs' rights, but their employment as a means of generating profit for Firmstone & Feil.

282 *Limited role of plaintiffs' solicitor.* The limited role of Robert Richards & Associates, who appeared on the record as solicitors for the retailer plaintiffs, is relevant to the question whether Firmstone & Feil's role created an abuse of process because it is relevant to the issue of control. The authorities have seen as a factor pointing against abuse the fact that the solicitors for plaintiffs are not chosen by the funder, that instructions were given to those solicitors by the plaintiffs and not the funder, and that the retainers of the solicitors were made by the plaintiffs and not the funder[376]. The respondents questioned whether

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375 *Clairs Keeley (a Firm) v Treacy* (2004) 29 WAR 479 at 493 [71] per Steytler, Templeman and McKechnie JJ.

376 *Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116 at 152 [62] per Morritt and May LJJ and Wall J; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394 at 419 [85] per Stone J; *QPSX Ltd v Ericsson Australia Pty Ltd (N 3)* (2005) 219 ALR 1 at 16 [61] per French J.

solicitors of this kind lessened the potential for abuse of process, but they did not challenge these authorities. The presence of an independent solicitor dealing directly with the plaintiffs tends to reduce control of the litigation by the funder and leave it in the hands of the plaintiffs. The control given to Firmstone & Feil by reason of the inability of the plaintiffs to make informed decisions and the limited contact which Firmstone & Feil is likely to have had with them could have been alleviated by the presence of solicitors who were independent of the funder, were entitled to advise their clients, and were likely to do so. But Firmstone & Feil had ensured that Robert Richards & Associates were not in that position. The respondents also questioned what level of involvement was appropriate for a solicitor dealing with a $4,000 claim. Perhaps not great; but the ceding of most involvement to a non-solicitor pursuing a one-third share of a multimillion dollar claim arrived at by aggregating many small claims suggests that the proceedings nominally brought for the plaintiffs' benefits are really brought for the non-solicitor's.

283 *Firmstone & Feil's monopoly position.* The failure of Firmstone & Feil to attract more retailers into litigation during the time while the limitation period was running led it to adopt the technique of soliciting lead plaintiffs to start representation proceedings just before the limitation period expired. The result – an unintended one, according to Mr Firmstone, whose evidence on this point Einstein J summarised without criticism – is that any retailer who wishes to recover from wholesalers can only do so on the terms put forward by Firmstone & Feil. The constitution of the proceedings as representative proceedings has given Firmstone & Feil, and only Firmstone & Feil, access to a share of the retailers' rights to litigate. Firmstone & Feil has thus used the court's process to give it the chance of a monopoly profit. The attempts of Firmstone & Feil to enlist the aid of the Supreme Court of New South Wales were attempts to get it to permit and facilitate the buying by the retailers of the product which Firmstone & Feil were seeking to sell, and the selling to Firmstone & Feil of the retailers' causes of action on terms which did not appear to be open to negotiation. In particular, the seeking of an order giving discovery of the names of retailers to whom the opt-in offers could be sent was an attempt to use the compulsory processes of the court to identify people with whom Firmstone & Feil might trade in these claims to its advantage.

284 *Analogy with others who profit from litigation?* The Court of Appeal downplayed the significance of Firmstone & Feil's profit motive by saying that many people seek profit from assisting the processes of litigation – lawyers, expert witnesses, forensic accountants, printers and couriers. There is no analogy. Those classes of people either have no desire to foment litigation which would not otherwise exist, or are ethically barred from doing so. Those classes are suppliers of particular professional or commercial services to many people. One category of the people supplied comprises people who are parties to litigation, who control that litigation, and who exercise their own judgment as to

what services should be supplied. The suppliers do not themselves create disputes out of nothing, decide how those disputes should proceed, and control the proceedings without input from the clients. The price, at least for the professional services supplied, can be hefty, but it is regulated, in part by competitive forces and in part by ethical constraints. Those ethical constraints prevent lawyers stipulating for a share of the fruits of victory. In the circumstances of this case there were in the end no competitive forces, and there are no ethical restraints on litigation funders.

285 *Remaining arguments of the respondents*. Finally, the respondents advanced two linked arguments. First, the court had overall supervision of the proceedings – under Pt 8 r 13, it could "otherwise order"; under Pt 8 r 17 it could give the conduct of the proceedings to any person it thought fit; and any settlement resulting in discontinuance depended on court approval under Pt 21 r 2. Secondly, the burden on those seeking to establish an abuse of process and thereby obtain a permanent stay was heavy. It was necessary for the court to be satisfied that there was no other available means of overcoming the abuse of process.

286 To some extent Firmstone & Feil and the trial judge explored methods of judicial control of the proceedings which could prevent there being an abuse of process, for example the offering of undertakings to the court in relation to costs. The respondents did not suggest any specific regime, using the court's powers under the rules or otherwise, for overcoming the problems described above, and in truth there are none available.

287 *Conclusion.* In short, the proceedings as structured by Firmstone & Feil depended on a harnessing of the alleged wrongs of the plaintiffs and of the curial processes established to remedy alleged wrongs for the primary purpose of generating profits for Firmstone & Feil. That was an abuse of process.

288 That conclusion may justify wider orders than the trial judge made. However, since the appellants do not ask for wider orders, it is not necessary to consider whether or not they should be made.

289 If that conclusion is thought by those who have power to enact parliamentary or delegated legislation to be unsatisfactory on the ground that the type of litigation funding involved in these appeals is beneficial, then it is open to them to exercise that power by establishing a regime permitting it. It would be for them to decide whether some safeguards against abuse should be incorporated in the relevant legislation.

Other issues

290 There is no need to deal with other arguments advanced by the appellants relating to whether the attempt to get discovery for the purpose of identifying members of the class to whom invitations to opt-in could be sent was defective for various reasons, and relating to whether there was a "matter" for the purposes of Ch III of the Constitution.

Orders

291 We agree with the orders formulated by Gummow, Hayne and Crennan JJ.

Callinan J
Heydon J